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Abstract

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KEYWORDS: labor, employment, law

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In the last year or so, state and federal courts have decided a variety of cases in the areas of labor and employment under Florida law. The constraints of this article necessarily preclude the discussion of labor and employment cases decided in Florida but interpreting *federal* law. This article surveys some of the significant rulings by the Florida appellate courts (although a U.S. Supreme Court decision interpreting Florida law and a new AIDS law are also included), focusing on (1) workers' compensation, (2) unemployment compensation, (3) employment discrimination, (4) restrictive covenants, (5) negligent hiring, supervision and retention, and (6) defamation and tortious interference with a contractual relationship. The focus is on individual employment rights rather than the relationship of labor unions and employers which is largely governed by federal law.

WORKERS' COMPENSATION

Workers' compensation is usually the exclusive relief available to an employee for a personal injury or death by accident arising out of and in the course of employment. One issue analyzed by a Florida court during the survey period dealt with whether an injury is "accidental" if it results from the intentional tort of a co-employee? In *Byrd v. Richardson-Greenshields Securities, Inc.*,[2] a Florida court ruled that the exclusivity of workers' compensation is not precluded by an intentional tort committed by an employee.

In *Byrd*, certain female employees alleged sexual harassment by the branch manager. The plaintiffs further alleged that the employer

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2. 527 So. 2d 899 (Fla. 2d Dist. Ct. App. 1988).

gave tacit approval by failing to investigate the workers' complaints. Claiming that this intentional infliction of emotional distress was not precluded by workers' compensation, the plaintiffs sued for compensatory and punitive damages. Both the trial court and the court of appeal held that the exclusivity of workers' compensation remedies barred this suit against the employer.[3]

As a preliminary matter, the court acknowledged that emotional, as well as physical injuries, are covered by workers' compensation laws.[4] Furthermore, the court assumed, but did not decide that the tort committed by the employee was intentional.[5] However, the court was unwilling to impute the employee's intent to the employer when the employer's involvement was no more than its having had notice.[6]

The court stressed that the employee who was the active tortfeasor was not the alter ego of the employer. As a result of this attenuated connection, the court refused to invoke the doctrine of respondeat superior to hold the employer liable.[7] Citing a recent decision of the Florida Supreme Court, the district court of appeal stated that "[i]n order for an employer's actions to amount to an intentional tort, the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death."[8] By negative inference, the decision in *Byrd* suggests that a common law tort action against an employer is not precluded by the exclusivity of the workers' compensation law where the employer's intent can be shown.

One of the most frequently litigated issues in workers' compensation law is the distinction between an employee and an independent contractor.[9] Employees are covered by workers' compensation, but independent contractors are not. Of course, where a common law tort

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3. *Id.* at 900.

4. *Id.* Emotional injuries are covered by workers' compensation so long as they result from not insubstantial physical contacts.

5. *Id.* at 902.

6. *Id.* At another point in the opinion, the court stated that there was no allegation indicating whether the recipients of the complaints were management level personnel who functioned as the alter egos of the corporate employers.

7. *Id.* at 901.

8. *Id.* (quoting Fisher v. Shenandoah General Constr. Co., 498 So.2d 882, 883 (Fla. 1986)).

9. For a discussion of how courts are moving away from the common law test toward an economic reality test for distinguishing employees from independent contractors in the labor area, see Hyland and Quigley, *Determination of Employee Status. Right to Control v. Economic Reality—Is There a Difference?*, 61 Fla. Bar J. 43 (Jan. 1987).

action is likely to yield a greater recovery, a plaintiff may escape the exclusivity of workers' compensation by convincing a court that she is, in fact, an independent contractor.[10]

In *Judy v. Tri-State Motor Transit Co.*,[11] plaintiff was hired to drive for Tri-State out of Missouri. However, as a term of employment Judy was required to agree to drive for Vanzandt, a lessor of tractors to Tri-State, rather than as a "company driver."[12] Under the terms of the lease agreement between Tri-State and Vanzandt, Judy worked as an independent contractor for Vanzandt. This lease agreement also provided that Tri-State would obtain workers' compensation coverage for Vanzandt's drivers, including Judy. In violation of Florida law,[13] Vanzandt deducted the costs of workers' compensation coverage from Judy's pay.[14]

During his first job Judy was seriously injured while helping another driver who was also pulling a Tri-State trailer with a tractor owned by an independent owner. Tri-State's insurer paid workers' compensation benefits to Judy as though he were an employee. Judy, contending that since he paid for his own coverage, claimed that he was an independent contractor; thus he contended he was free to sue Tri-State in negligence.[15]

A jury found that Judy was not an employee of Tri-State and awarded him $1.8 million in damages. The district court set aside the jury verdict and held, as a matter of law, that Judy was a Tri-State employee. As a consequence, Judy's tort action was barred by the exclusivity of workers' compensation.[16]

On appeal, the Court of Appeals for the Eleventh Circuit acknowl-

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10. *See, e.g.*, Eckis v. Sea World Corp., 64 Cal. App. 3d 1, 134 Cal.Rptr. 183 (Ct. App. 1976).
11. 844 F.2d 1496 (11th Cir. 1988).
12. *Id.* at 1497.
13. FLA. STAT. § 440.21 (1987) provides in part:

> (1) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.083.

14. *Judy*, 844 F.2d at 1498.
15. *Id.*
16. *Id.* at 1499.

edged that under federal law Judy was a statutory employee of Tri-State.[17] If Judy had injured a member of the public, Tri-State would be liable, under federal law, for Judy's negligence. However, the law of Florida, and not federal law, determines whether Judy is Tri-State's employee for purposes of workers' compensation. Turning to Florida law, the eleventh circuit determined that Florida courts look to all of the circumstances of a relationship to decide whether a worker is an employee or an independent contractor.[18] Under Florida law, the mere presence of a federal statutory employment relationship does not itself create an employment relationship for workers' compensation purposes.[19] Nevertheless, the Eleventh Circuit agreed with the district court both that the employee/independent contractor distinction is a question of law rather than of fact and that Judy was an employee of Tri-State as a matter of Florida law.[20]

The court concluded that Judy was an employee primarily because he "was subject to Tri-State's direction and control not only in obtaining the intended result of the work, but also in the means used to achieve that result."[21] Finally, based on Florida precedent, the court rejected Judy's contention that he could not be Tri-State's employee because he paid for his workers' compensation coverage himself.[22]

The "arising out of" component of the test for receiving workers' compensation requires a causal connection between the injury and the employment.[23] Injuries resulting from idiopathic falls, i.e., from risks personal to the employee, generally are treated as not arising out of the employment.[24] Some jurisdictions provide compensation for idiopathic falls only where the employment creates an increased risk of injury.[25] Others, following the more liberal "actual risk" approach, merely ask

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17. *Id.* at 1502-03.

18. *Id.* at 1504.

19. *Judy*, 844 F.2d at 1502 (discussing Empire Fire & Marine Ins. Co. v. Truck Ins. Exchange, 462 So. 2d 76 (Fla. 1st Dist. Ct. App. 1985)).

20. *Id.* at 1503, 1505.

21. *Id.* at 1503.

22. *Id.* at 1506 (relying on Justice v. Belford Trucking Co., 272 So. 2d 131 (Fla. 1972) (Florida Supreme Court ruled that the truck driver was an employee rather than an independent contractor even though payroll deductions were made for workers' compensation coverage)).

23. *See* FLA. STAT. §§ 440.02(1), (14), 440.09 (1987).

24. 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 12.00 (1985).

25. *See id.* at § 12.14(a), at 3-318 to 3-321 n.23.

whether the risk realized was in fact a risk of one's employment.[26] Florida's First District Court of Appeal recently rejected the increased hazard doctrine in favor of the actual risk test in *Grimes v. Leon County School Board*.[27]

The claimant, Thelma Grimes, had been employed for twenty-one years by the School Board at the time of the injury. Grimes wore a full brace on her right leg as a result of polio. While at work Grimes stood up to retrieve a file and manually locked the brace at the knee as usual. The brace gave way and she fell, fracturing her left ankle.[28]

The deputy commissioner denied Grimes's workers' compensation claim on the basis that the injury did not arise out of her employment; following the "increased hazard" doctrine, the commissioner ruled that the injury resulted solely from a preexisting condition without the conditions of employment contributing to the risk or aggravating the injury.[29]

On appeal, the court decided that the confusion in the case law required a reexamination of the origin and the logic of the "increased hazard" doctrine as applied to idiopathic falls.[30] The court's new rule, adopting the actual risk doctrine, renders irrelevant whether the act of falling was initiated by a condition personal to the claimant.[31] Compensation is available for any injury resulting from a fall at any place where the employee's duties require her to be.[32]

The court in *Grimes* found support for adoption of the actual risk doctrine from many sources.[33] To begin with, the new rule is merely an extension of the familiar maxim that the employer takes the worker as the worker is found—with all the strengths and weaknesses the worker brings to the job. Moreover, focusing on the cause of the injury, under the actual risk doctrine, is more consistent with the no-fault concept of workers' compensation than focusing on the cause of the accident which is more consistent with the discarded fault system. Finally, the new rule is similar to the "positional risk" theory, adopted by Florida courts,[34] under which the only inquiry is whether claimant's employ-

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26. *See id.* at 3-321 to 3-322 n.24.
27. 518 So. 2d 327 (Fla. 1st Dist. Ct. App. 1987).
28. *Id.* at 328.
29. *Id.* at 329.
30. *Id.*
31. *Id.* at 331.
32. *Id. See also* 1 A. LARSON, *supra* note 24, § 12.14(a), at 3-321 to 3-322 n.24.
33. *Grimes*, 518 So. 2d at 331.
34. *See, e.g.*, Hacker v. St. Petersburg Kennel Club, 396 So.2d 161 (Fla. 1981)

ment was responsible for her being at the time and place where an injury occurred.[35]

Citing Larson's treatise on Workers' Compensation Law, the court in *Grimes* found increasing support in other jurisdictions for compensating idiopathic-fall injuries.[36] This minority of jurisdictions has emphasized that idiopathic-fall injuries involve very strong "in the course of employment" elements. A weak causal or "arising out of employment" component is insufficient to deny compensation. Nevertheless, the court in *Grimes* certified the issue to the state's highest court since this new statutory interpretation appears potentially inconsistent with recent Florida Supreme Court decisions.[37]

Florida law expressly provides that an employee may not be discharged for filing a workers' compensation claim.[38] The Florida Supreme Court recently discussed the proper limitations period for bringing a wrongful discharge suit alleging retaliation for filing a compensation claim in *Scott v. Otis Elevator Co.*[39] The issue involved the proper characterization of a wrongful discharge action: is it a breach of contract or tortious in nature?

In *Scott*, the district court had ruled that the limitations period for such a wrongful discharge action was subject to the two year time bar found in state law governing "suits for wages."[40] The court appears to have treated plaintiff's allegations as a form of breach of contract in applying the two year limitations period.

In contrast the Florida Supreme Court characterized the retaliatory discharge action as tortious in nature.[41] As such, the suit was gov-

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(held that if injury occurs while worker is at place of employment during working hours, under circumstances such that evidence of cause of injury is unavailable, the burden shifts to employer to show idiopathic cause).

35. *See* 1 A. LARSON *supra* note 24, § 10.00 (defining and discussing positional and neutral risks).

36. *Id.* § 12.14(a), at 3-321 to 3-322 n.24.

37. Grimes v. Leon County School Bd., 518 So. 2d 327, 335-36 (Fla. 1st Dist. Ct. App. 1987).

38. FLA. STAT. § 440.205 (1987) provides: "No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law."

39. 524 So. 2d 642 (Fla. 1988).

40. *Id.* (citing FLA. STAT. § 95.11(4)(c) (1985)).

41. *Id.* Even though Florida does not recognize a common law action for retaliatory discharge. *See* Smith v. Piezo Technology & Professional Administrators, 427 So. 2d 182 (Fla. 1983).

erned by the four year limitations period for statutory causes of action.[42]

In *Bordo Citrus Products v. Tedder*,[43] the First District Court of Appeal examined the meaning of the phrase "total loss of use" of a limb for purposes of determining eligibility for catastrophic temporary total disability benefits. Temporary total benefits are paid for injuries that prevent an employee from working until he or she is fully recovered.

Judy Tedder injured her left hand and wrist while working as a citrus grader in a packing plant.[44] Despite several surgeries, the injuries made continued employment painful and uncomfortable and eventually rendered her entire arm immobile. The workers' compensation deputy commissioner ruled that Tedder was entitled to temporary total disability benefits until either she regained the use of her arm or the statutory twenty-six weeks expired. The employer and the employer's insurer appealed two issues: the meaning of "total loss of use" in Florida Statutes, section 440.15(2)(b) and determining the "date of injury."[45]

On appeal, the court affirmed the commissioner's finding of total loss of use of Tedder's left arm.[46] Impairment less than amputation that is caused by organic damage can satisfy the statutory prerequisite of total loss of use, thus qualifying claimant for catastrophic temporary total disability benefits. The key is the "inability to perform functions required in an industrial setting considered in light of the use which a claimant must reasonably make of the member in his employment."[47]

Regarding the second issue, the employer argued that the date of injury was the date of the accident thus terminating benefits six months after the initial injury.[48] Relying on the definition of "injury" in section 440.02(14), the court ruled that organic damage to the nervous system may occur well after the date of the accident.[49] The court remanded for the proper determination of the date of the injury.[50]

A perplexing issue of employer liability is presented when an em-

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42. *Scott*, 524 So. 2d at 642 (citing FLA. STAT. § 95.11(3)(f) (1985)).
43. 518 So. 2d 367 (Fla. 1st Dist. Ct. App. 1987).
44. *Id.* at 368.
45. *Id.* at 370.
46. *Id.*
47. *Id.* at 369. (quoting Atlantic Plastering, Inc., v. O'Hara, 434 So. 2d 743 (Fla. 1st Dist. Ct. App. (1984)).
48. *Id.* at 370.
49. *Id.* at 371.
50. *Id.* at 372.

ployee is injured working for employer A, appears to fully recover, then proceeds to work for employer B where the worker suffers a similar injury. Are these two injuries distinct or is the second merely an aggravation of a preexisting condition? A reasonable approach in the face of uncertainty would be to apportion the workers' compensation claim between the two employers. However, apportionment of claims for temporary disability, medical benefits, and wage-loss benefits is barred by statute in Florida.[51]

This issue of multiple employer liability for a worker's successive accidents arose in *Simmons v. Trinity Industries*.[52] Jerry Simmons injured his back while employed by Trinity. By May 23, 1986, the treating doctor stated that Simmons had reached maximum medical improvement with no permanent impairment and with no restrictions. Later that same day Simmons was hired by Porter Plastics; working the night shift, he suffered a herniated disc stacking plastic pipes and has not worked since that time.[53]

The workers' compensation deputy commissioner found, and the district court of appeal affirmed, that Simmons had fully recovered from his earlier back injury by May 23, 1986. Consequently, Trinity was not liable for medical and temporary benefits incurred by Simmons's subsequent herniated disc.[54]

The deputy dismissed Simmons's claim against Porter for temporary disability benefits because Simmons withheld information regarding his physical condition when he applied for work.[55] The court reversed, ruling that the claimant did not make a knowingly *false* representation when seeking a job with Porter. The doctor's statement of Simmons's full recovery by May 23, 1986 absolving Trinity of liability could now be used to show the absence of scienter when Simmons applied for a job with Porter.[56]

The Florida Supreme Court recently interpreted a latent ambiguity in the state's Workers' Compensation Act in *Nikula v. Michigan*

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51. FLA. STAT. § 440.15(5)(a) (1987); *see* Hayward Trucking, Inc. v. Aetna Ins. Co., 445 So.2d 385 (Fla. 1st Dist. Ct. App. 1984).

52. 528 So. 2d 1337 (Fla. 1st Dist. Ct. App. 1988).

53. *Id.* at 1338.

54. *Id.* The court reserved the issue of Trinity's liability for permanent benefits in the event Simmons's injuries prove to be cumulative.

55. *Id.* at 1339. This defense is based on Martin Co. v. Carpenter, 132 So. 2d 400 (Fla. 1961).

56. *Simmons*, 528 So. 2d at 1339.

Mutual Insurance.[57] The provision concerned the subrogation rights of the employer's insurer to sums recovered by the injured employee in a settlement reached with a third party tortfeasor. In *Nikula* an employee was seriously injured when he was struck on the head by a piece of scaffolding. Workers' compensation benefits were paid by Michigan Mutual, the employer's insurer. Subsequently, the injured employee's guardian reached a settlement in a suit against the third party maker of hard hats. Michigan Mutual sought a pro rata share of this settlement.[58]

The relevant statutory provision provides as follows:

> Upon suit being filed, the employer or the insurance carrier, as the case may be, may file in the suit a notice of payment of compensation and medical benefits to the employee or his dependents, which said notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law. The employer or carrier shall recover from the judgment, after attorney's fees and costs incurred by the employee or dependent in that suit have been deducted, 100 percent of what it has paid and future benefits to be paid, unless the employee or dependent can demonstrate to the court that he did not recover the full value of damages sustained because of comparative negligence or because of limits of insurance coverage and collectibility.[59]

The trial court determined the following relevant figures: 1) the full value of the injured worker's damages was $15,000,000; 2) the worker's comparative negligence was 90%; and 3) the parties settled for $3,600,000.[60] What seems to be unusual in the case is that the ratio of settlement amount to full value of damages (24%) differs from the percentage of comparative negligence. In other words, the settlement amount exceeded the tortfeasor's fault by 14%. Is the carrier entitled to a 10% or 24% pro rata share of the worker's settlement from the third party tortfeasor?

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57. 531 So. 2d 330 (Fla. 1988).
58. *Id.* at 331.
59. FLA. STAT. § 440.39(3)(a) (1987). The statute was amended in 1983 to take into account the employee's expenses in making the third-party claim. The controlling factor for settlements involving comparative negligence under the amended provision is the ratio of net recovery to full value of damages. *Nikula*, 531 So. 2d at 332.
60. *Nikula*, 531 So. 2d at 331.

The trial court ruled that the carrier was entitled to only a ten percent share in the settlement.[61] This approach, as the Florida Supreme Court's opinion notes, undermines what is otherwise a common interest of both the worker and the carrier to minimize comparative negligence in suing the tortfeasor. A conflict is unnecessarily created if the worker later has an incentive to assert maximum comparative negligence. In contrast, both higher courts decided that the carrier was to be reimbursed in the same ratio as the injured worker.[62]

The dissent accuses the majority of amending the statute by its decision. Although conceding that the majority's approach to lien reduction in a settlement situation was equitable, the dissent stated that the trial court had followed the "clearly enunciated standard" set forth in the statute.[63]

LEGAL ISSUES IN UNEMPLOYMENT COMPENSATION BENEFITS

When an unemployed person seeks benefits from the Florida Department of Labor and Employment Security, the employer has a monetary incentive to contest each claimant's eligibility. For example, in Florida, an employer who has paid claims to former employees less than eight calendar quarters contributes to the state system at the rate of 2.7% of wages while an employer who has paid eight or more quarters is taxed at the higher rate of 5.4%.[64]

Former employees will be denied unemployment compensation benefits if certain grounds for disqualification exist. Most disputes about initial eligibility concern whether the claimant left the former job "voluntarily," or whether he or she was fired "for misconduct connected with the work."[65] Both of these categories of disqualification

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61. *Id.*
62. *Id.* at 332.
63. *Id.* at 333.
64. FLA. STAT. §§ 443.131(2)(a), (b) (1987).
65. The Florida statute defines "misconduct" as follows:

'Misconduct' includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
(a) Conduct evincing such willful or wanton of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or
(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional

have recently received judicial attention in the cases that follow.

Hobbie v. Unemployment Appeals Commission[66] involved an assistant manager of a jewelry store, Paula Hobbie, who informed her employer, Lawton and Company, that she would no longer be able to work on Saturdays because of her recent conversion to the Seventh-Day Adventist Church. The supervisor was willing to make a reasonable accommodation which worked well until the employer found out and discharged Hobbie for refusing to work Saturdays.[67]

When Hobbie filed a claim for unemployment compensation her employer contested eligibility on the grounds that Hobbie had been discharged for "misconduct connected with [her] work."[68] The claims examiner, the Unemployment Appeals Commission, and the Court of Appeals for the Fifth Circuit all agreed with the employer and denied benefits.[69]

The United States Supreme Court ruled, however, that disqualifying Hobbie from unemployment benefits on the basis of her religious convictions violated the free exercise clause of the first amendment.[70] Prior Supreme Court decisions in *Sherbert v. Verner*[71] and *Thomas v. Review Board*[72] had involved the identical issue. In *Sherbert*, the Court held that the State's disqualification

> force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship."[73]

Just as in *Sherbert* and *Thomas*, the Court held that Florida's denial of benefits could not withstand strict scrutiny. The Court refused to apply

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and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

FLA. STAT. § 443.036(25) (1987).

66. 107 S. Ct. 1046 (1987).

67. *Id.* at 1048.

68. *Id.* (quoting FLA. STAT. § 443.101(1)(a) (1985)).

69. *Id.*

70. *Id.* The first amendment is made applicable to the states through the fourteenth amendment. *See* Cantwell v. Connecticut, 310 U.S. 203 (1948).

71. 374 U.S. 398 (1963).

72. 450 U.S. 707 (1981).

73. *Sherbert*, 374 U.S. at 404.

a less rigorous standard proffered by the Appeals Commission.[74]

The Court also rejected the Appeals Commission's attempt to distinguish the complete ineligibility of the claimant in *Sherbert* from the more limited disqualification under Florida law.[75] The Appeals Commission suggested yet another distinction between this case and *Sherbert* and *Thomas*. In those earlier cases, the claimant was hired with existing scruples about Saturday work, and it was the employer who made scheduling changes precipitating the problem. In contrast, Hobbie changed her religion after she had been working two and one-half years thus creating the conflict.[76] The Court ruled that the timing of Hobbie's conversion was immaterial.[77]

Finally, the Court rejected the Appeals Commission's argument that the awarding of benefits to Hobbie entangles the State in an unlawful fostering of religion. The extension of unemployment benefits to Hobbie, the Court stated, "reflects nothing more than the governmental obligation of neutrality in the face of religious differences. . . ."[78]

The issue of disqualification on the basis of misconduct was addressed in several recent cases. In *School Board v. Unemployment Appeals Commission*,[79] the employer contested a discharged teacher's aide's claim for unemployment compensation. The school board had found, after an adversary administrative hearing, that the former employee had engaged in sexual intercourse with a female juvenile-student-detainee.

The unemployment claims examiner, awarding the employee compensation, decided (and the unemployment appeals commission affirmed) that the employer failed to substantiate its charges of misconduct. The Fifth District Court of Appeal reversed. The court ruled that the school board's factual determination that the employee had extramarital sexual intercourse with a student could not be re-litigated before the claims examiner.[80] Moreover, the court found that this basis for discharge is misconduct as a matter of law.[81] Consequently, claimant was disqualified from receiving unemployment benefits.[82]

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74. Hobbie v. Unemployment Appeals Comm'n., 107 S. Ct. 1046, 1049 (1987).
75. *Id.* at 1050.
76. *Id.* at 1050-51.
77. *Id.*
78. *Id.* (quoting *Sherbert*, 374 U.S. at 409.)
79. 522 So. 2d 557 (Fla. 5th Dist. Ct. App. 1988).
80. *Id.* at 557.
81. *Id.* at 557 n.2.
82. *Id.* at 557.

Similarly, the Fourth District Court of Appeal decided, in *Sturaitis v. Montanari Clinical School, Inc.*,[83] that a teacher who was discharged for striking a mentally retarded student with a pointer and throwing a cup of coffee across the shirt of another student constituted misconduct sufficient to bar unemployment compensation.

In *Anderson v. Unemployment Appeal Commission*,[84] an employee discharged for fighting on the job appealed the Commission's denial of unemployment compensation benefits. The appeals referee had determined that although the claimant did not initiate the fight, he had a duty not to strike a retaliatory blow.[85] On appeal, the court ruled that neither the statutory definition of "misconduct" nor the case law interpreting it required the claimant to refrain from striking a retaliatory blow:

> while the appellant's failure to withdraw rather than striking a retaliatory blow may have shown poor judgment and inability to control himself which justified his employment dismissal, this conduct did not constitute misconduct as defined by section 443.036(24) so as to justify denying him unemployment compensation benefits.[86]

Misconduct is not the only reason for disqualifying a claimant from benefits. Unemployment compensation is only available to those employees who have lost their jobs through no fault of their own. Florida Statutes, section 443.101(1)(a) states that an individual shall be disqualified for benefits: "For the week in which he has voluntarily left his employment without good cause attributable to his employer. . . ."[87] Several recent cases have interpreted this provision.

Adain v. Florida Unemployment Appeals Commission[88] involved a Haitian alien working legally in the United States. The Immigration and Naturalization Service (INS) illegally revoked his work permit. Believing he was not able to work, Adain left his job and applied for

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83. 522 So. 2d 429 (Fla. 4th Dist. Ct. App. 1988).
84. 517 So. 2d 754 (Fla. 2d Dist. Ct. App. 1987).
85. *Id.* at 755.
86. *Id.* at 756.
87. FLA. STAT. § 443.101(1)(a) (1987). Prior to 1963 the employee needed only to show that he was voluntarily leaving for a good reason. He did not need to show that he left for a good cause attributable to the employer. The amendment was intended to narrow eligibility for unemployment compensation. *See* Beard v. Fla. Dep't of Commerce, Div. of Employment Sec., 369 So. 2d 382 (Fla. 2d Dist. Ct. App. 1979).
88. 523 So. 2d 175 (Fla. 3d Dist. Ct. App. 1988).

unemployment benefits. The appeals referee denied Adain's claim because he had voluntarily quit his job without good cause attributable to his employer.[89]

The Third District Court of Appeal agreed, however, with Adain that he left his job involuntarily when forced to do so by the revocation of his work permit. Nevertheless, the court continued, the claimant's departure was not caused by his employer. The fault of a third party, the INS, would not be borne by the employer. The court allocated the fault of the INS to an equally innocent party, Adain, despite the fact that the unemployment compensation statute is remedial and intended to be construed liberally.[90]

Buckeye Cellulose Corp. v. Williams[91] addressed the question of whether the actions of an employer can result in an employee quitting with good cause, and therefore enable the employee to be compensated under the Florida unemployment statute. The fifth circuit termed this situation "constructive discharge" in *Pittman v. Hattiesburg Municipal Separate School District*:[92]

> Constructive discharge occurs when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. To find constructive discharge, the court determines whether or not a reasonable person in the employee's position and circumstances would have felt compelled to resign. The employee thus does not have to prove it was the employer's purpose to force the employee to resign.[93]

In *Buckeye*, Williams quit his job because of harassment and pressure by his supervisor.[94] The employer appealed the decision of the Unemployment Appeals Commission, which awarded benefits to Williams. The First District Court of Appeal affirmed that the referee's findings were sufficient to show that the claimant quit as a result of the employer's harassment; therefore the court found that Williams had good cause to quit his job.[95]

The dissent in *Buckeye* argued that Williams did not quit for

89. *Id.* at 176.
90. *See* FLA. STAT. § 443.031 (1987).
91. 522 So. 2d 39 (Fla. 1st Dist. Ct. App. 1988).
92. 644 F.2d 1071 (5th Cir. 1981).
93. *Id.* at 1077.
94. *Buckeye*, 522 So. 2d at 39.
95. *Id.* at 40.

workers were paid on a commission basis; they could work for competitors; and the employer provided no benefits nor did Delco deduct taxes from commissions.[103]

The employer appealed the decision of the Division of Unemployment Compensation claiming that the telephone solicitors were employees. The Fourth District Court of Appeal ruled that the workers were independent contractors; therefore, Delco was not liable for unemployment taxes.[104] Relying on the test enunciated by the Florida Supreme Court in *Cantor v. Cochran*,[105] the court ruled that Delco did not exert sufficient control over the details of the job to render the workers employee status.[106]

Similarly, in *Global Home Care, Inc. v. Florida Department of Labor & Employment Security, Division of Unemployment Compensation*,[107] the Second District Court of Appeal reversed an administrative decision that "live-in aides" were employees rather than independent contractors. Once again, applying the factors established in *Cantor v. Cochran*, the court ruled that Global's control was confined only to the results and did not extend to the means used to achieve those results. Visits by Global's nurses were not for surveillance of the aides' performance, but for monitoring the patient's condition.

A couple of miscellaneous issues concerning unemployment compensation were addressed by recent court rulings. A procedural matter was resolved in *Robinson v. Florida Unemployment Appeals Commission*.[108] In *Robinson*, the court addressed the issue of whether the Unemployment Appeals Commission has jurisdiction when an appeal is filed late. Relying on the rule of liberal construction contained within the unemployment compensation statute,[109] the Fourth District Court of Appeal decided that the Commission possesses jurisdiction to hear an appeal when uncertainty exists as to when the claimant actually received notice of the right to appeal.

Finally, in *Jack Eckerd Corp. v. Florida Unemployment Appeals*

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103. *Id.* at 1111

104. *Id.* at 1112.

105. 184 So. 2d 173 (Fla. 1966). The court adopted the factors formulated by RESTATEMENT OF LAW, AGENCY 2D § 220 for determining whether an employer-employee relationship exists.

106. *Delco*, 519 So. 2d at 1112.

107. 521 So. 2d 220 (Fla. 2d Dist. Ct. App. 1988).

108. 526 So. 2d 198 (Fla. 4th Dist. Ct. App. 1988).

109. *See* FLA. STAT. § 443.031 (1987).

Commission,[110] the Third District Court of Appeal reversed the Commission and held that an employee was entitled to unemployment compensation. When the employer was assessed court costs as the losing party he argued that the Commission, and not he, was the "losing party" and hence liable for the costs of the appeal. After all, the Commission is a party respondent in every appellate proceeding involving a decision on the merits of a compensation claim.[111]

The court ruled that as between the employer and the commission, only the employer is in a position to gain or lose by the results of the compensation appeal (i.e., the employer's unemployment compensation tax rate is at stake).[112] The commission has no cognizable "interest" in the appeal. As the unsuccessful real party in interest Eckerd was correctly held liable for the costs of the appeal.

EMPLOYMENT DISCRIMINATION

Florida has enacted a fair employment practices law, the Human Rights Act of 1977, which proscribes various types of discrimination in private and public employment.[113] The Act prohibits job discrimination based on race, color, religion, sex, national origin, age, handicap, and marital status.[114] Florida courts have grappled with important issues arising under the Act this past year.

Age discrimination was the subject of two recent Florida cases. In *Hullinger v. Ryder Truck Rental, Inc.*[115] the court decided the proper limitations period for bringing an age discrimination suit under the Act. The employee, Hullinger, contended that the four year time bar for violations based upon a statutory liability applied. Both the trial court and the court of appeal, however, applied the two year period for suits for wages even though the plaintiff requested more than back pay. Thus, the employment discrimination action was barred.

Forced retirement based solely on age is unlawful under Florida's Human Rights Act. Rather inconsistently, Florida Statutes, section 231.031 provides that "no person shall be entitled to continued employ-

110. 525 So. 2d 468 (Fla. 3d Dist. Ct. App.. 1988).
111. *See* FLA. STAT. § 443.151(4)(e) (1987).
112. *Jack Eckerd Corp.*, 525 So. 2d at 469.
113. For a summary comparison of Florida's Human Rights Act with parallel federal statutes, see Klink, *Florida's New Human Rights Act*, 52 FLA. B.J. 321 (April 1978).
114. FLA. STAT. § 760.10 (1987).
115. 516 So.2d 1148 (Fla. 5th Dist. Ct. App. 1987).

ment" as a public school teacher after he or she has reached age seventy. The Florida Supreme Court reconciled the two potentially clashing provisions in *Morrow v. Duval County School Board*.[116]

Robert Morrow was a tenured teacher in the Duval County school system for twenty years with excellent evaluations before turning seventy. Although he received an annual contract for the 1982-83 school year, Morrow was not rehired for the following year. The school board relied on section 231.031, essentially taking the position that discrimination on the basis of age is permissible after age seventy. Morrow sued, asserting that the Human Rights Act bars age discrimination even after the age of seventy.

The state Human Relations Commission agreed with Morrow and recommended back pay, benefits, and a "reevaluation of plaintiff's employment request without reference to age."[117] The First District Court of Appeal reversed, concluding that section 231.031 authorized the school board to refuse to hire a teacher solely because he or she has reached age seventy.

The Florida Supreme Court rendered section 231.031 consistent with the bar on age discrimination. According to the court, the language "no person shall be entitled to continued employment" contained in section 231.031 merely removes tenure rights after a teacher reaches age seventy: "the over-seventy teacher [is] in the position of an at-will employee on a year-to-year contract basis."[118] Thus, the school board could refuse to rehire Morrow for the 1983-84 school year for no reason, but it was not free to refuse to hire him *solely* on the basis of age. How much real protection this interpretation affords one who is over-seventy is problematic.

Handicap discrimination is expressly prohibited by Florida's Constitution.[119] But it was not until the legislature passed the Human Rights Act that a mechanism was put in place for relief from this form of discrimination.[120] Although the Act does not define the term handicap, the Commission on Human Relations has adopted a usage which appears broader than the definition contained in the Federal Rehabilitation Act of 1973.[121]

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116. 514 So. 2d 1086 (Fla. 1987).
117. *Id.* at 1087.
118. *Id.* at 1088.
119. FLA. CONST. art. I, § 2.
120. FLA. STAT. § 760 (1987).
121. For a brief comparison of the federal Rehabilitation Act of 1973 with Flor-

The Third District Court of Appeal addressed the issue of handicap protection for a public employee with a drug dependence involving cocaine and alcohol. In *Lavery v. Department of Highway Safety*,[122] the Public Employee Commission upheld the dismissal of a Highway Patrol trooper by the Department of Highway Safety for poor work performance resulting from the illegal use of cocaine. The trooper, Lavery, argued that his good faith effort to rehabilitate himself compelled his employer to retain him pending the results of those efforts.

The district court distinguished between troopers suffering from "pure" alcoholism—which allows for a more lenient, treatment-oriented dismissal procedure—and Lavery's condition of "poly-drug" addiction. Because Lavery's use of cocaine amounted to a serious criminal violation, his employer was not required to retain Lavery pending his rehabilitation efforts. Neither the federal nor the state handicap protection laws prevented this result.[123]

Discrimination on the basis of exposure to Acquired Immune Deficiency Syndrome ("AIDS") is the most recent example of handicap discrimination.[124] Employees with AIDS and those who carry the virus have been the victims of employment discrimination. Florida recently enacted a comprehensive nondiscrimination law providing greater protection against job bias on this basis.[125]

The new statute appears broader than both the Federal Rehabilitation Act and the Florida Human Rights Act in several ways. First, under the new law, employment protection is extended not only to those employees diagnosed as suffering from AIDS, but also to those who have merely been exposed to the disease.[126] Second, Florida's new AIDS law applies to *all* employers without any minimum employee re-

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ida's protection of the handicapped in employment, see Gonzalez, *Discrimination in Employment Based Upon Handicaps*, 52 FLA. B.J. 145 (Feb. 1978).

122. 523 So. 2d 696 (Fla. 3d Dist Ct. App. 1988).

123. *Id.* at 697-98.

124. In Shuttleworth v. Broward County Office of Budget and Management, 1985 DAILY LAB. R. 242:E-1, the Florida Commission on Human Relations ruled that AIDS is a handicap within the meaning of the Florida Human Rights Act.

125. *See* 1988 Fla. Laws 88-380, § 45 (1988). For an overview of this new statute and its relationship to existing state and federal handicap law, see Barford and Wiley, *AIDS Discrimination in Florida: Further Restrictions on Employers' Rights*, 62 FLA. B.J. 45 (Oct. 1988).

126. It has been suggested that the new law might actually provide protection to gay persons not actually infected with the virus but who are perceived by their employers as though they have been infected. *See* Barford and Wiley, *supra* note 125, at 46.

quirement.[127] Third, it specifically regulates AIDS testing by employers. And lastly, the law prescribes expedited procedures to cure AIDS discrimination.

Florida goes further than federal law by protecting against employment discrimination on the basis of marital status.[128] Unfortunately, the Human Rights Act does not define the term; consequently the prohibition of marital status discrimination in Florida has been described as "at best an amorphous one."[129] The subtle complexity of marital status discrimination was explored in *National Industries, Inc. v. Commission On Human Relations*.[130]

Sharon Morand, a probationary employee, worked for National as an assembly line person in the manufacture of doors. Her husband, Robert, also worked for National, but in a different area of the plant. Robert was laid off as a result of employee complaints against him alleging "sexual harassment, rudeness, obscene language, threats, and potential violence."[131] Despite a warning to stay away, Robert continued to visit National's premises. Consequently, National terminated Sharon's employment to eliminate the chance that her husband would again visit the premises.

Sharon Morand sought relief from the state Commission on Human Relations. While the hearing officer found no discrimination after conducting a hearing (for which there was no transcript), the Commission ruled that the employer unlawfully discriminated against Sharon by terminating her employment on the basis of her marital status. The Commission rejected the hearing officer's conclusion that Sharon had failed to establish a prima facie case of marital status discrimination since National would have fired Sharon even if she had not

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127. Contrast the scope of this law with the Federal Rehabilitation Act of 1973 which applies only to federal contractors or to the Florida Human Rights Act which governs employers with fifteen or more employees.

128. FLA. STAT. § 760.10(1)(a) (1987) provides as follows:

> (1) It is an unlawful employment practice for an employer: (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or *marital status* (Emphasis added).

129. Alley, *Marital Status Discrimination: An Amorphous Prohibition*, 54 FLA. B.J. 217 (Mar. 1980).

130. 527 So. 2d 894 (Fla. 5th Dist. Ct. App. 1988).

131. *Id.* at 895.

been married to Robert. According to the Commission, Sharon established a prima facie case of discrimination and National failed to show that no less discriminatory alternative was available other than to fire Sharon.[132]

On appeal, the district court reversed, asserting that the Commission erred by imposing too restrictive an interpretation on the term "marital status."[133] Based on its conclusion that discriminatory intent is a question of fact rather than of law, the court ruled that the Commission was bound (in the absence of a transcript) by the hearing officer's finding that Sharon's termination was motivated not by her marital status but by National's legitimate business concerns in keeping her husband from the premises.[134] Citing George Orwell's "1984," the court accused the Commission of "doublethink" by its distortion of the hearing officer's factual findings.[135]

The jurisdiction of the Commission on Human Relations to raise new issues on its own in a case pending before it was addressed in *Conklin Center v. Williams*.[136] Despite its ruling that an employee was not terminated on account of her race, the Commission *sua sponte* found evidence of "a discriminatory work environment," a claim not alleged by the parties.[137] The district court reversed, concluding that the Commission's ruling violated procedural due process since the employer was without notice that the issue of discriminatory work environment was properly before the Commission.

The recent decision of *Laborers' International Union of North America, Local 478 v. Burroughs*[138] addressed two separate concerns: 1) what kinds of remedies may an administrative board constitutionally award without abrogating a uniquely judicial power? and 2) what is the proper test for determining whether a local ordinance is preempted by an overlapping state statute?

Burroughs alleged sexual harassment by her supervisor in violation of a Dade County ordinance and filed a charge with the Dade County Fair Housing and Employment Appeals Board. After a hearing, the Board awarded Burroughs back pay and front pay among other reme-

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132. *Id.* at 896.
133. The court made it clear that even a broad interpretation of "marital status" would not alter the decision in this case. *Nat'l. Indus., Inc.*, 527 So. 2d at 897 n.1.
134. *Id.* at 897-98.
135. *Id.* at 898.
136. 519 So. 2d 38 (Fla. 5th Dist. Ct. App. 1987).
137. *Id.* at 39.
138. 521 So. 2d 312 (Fla. 3d Dist. Ct. App. 1987).

dies.[139] On appeal to the district court, the claim was made that remedies such as back pay and front pay are equitable in nature and thus not awardable by an administrative board.[140] The court rejected this distinction and substituted its own based on the language of a Florida Supreme Court decision that there is: "a significant distinction between administrative awards of quantifiable damages for such items as back rent or back wages and awards for such nonquantifiable damages as pain and suffering or humiliation and embarrassment."[141] In other words, an administrative board is constitutionally authorized to award economic damages but not non-economic damages.

The second issue arose because the defendant employer, Local 478, employed eleven persons during the relevant period. No jurisdiction arose under Florida's Human Rights Act of 1977 because that statute defines "employer" as "any person employing 15 or more employees. . . ."[142] However, the Dade County ordinance governs employers with five or more employees.[143] Local 478 unsuccessfully argued that by extending its reach to employers with five or more employees, the local ordinance was preempted by the state statute.[144]

The court ruled that the test of conflict was whether a person must violate one provision in order to comply with the other, i.e., when two legislative enactments cannot co-exist. Applying this test the court concluded that the local ordinance was not preempted merely because it extended identical anti-discrimination requirements upon a wider and broader class of persons than the state.[145]

ENFORCEABILITY OF RESTRICTIVE COVENANTS

Covenants not to compete are of two types: those requiring that the seller of a business will not compete with the buyer[146] and those requiring that promises exacted from an employee not to compete after

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139. *Id.* at 853.

140. FLA. CONST art. V, § 1 draws a distinction between judicial power and quasi-judicial power.

141. *Burroughs*, 522 So. 2d at 856. (Schwartz, J., dissenting) (quoting Broward County v. La Rosa, 505 So. 2d 422, 424 n.5 (Fla. 1987)).

142. FLA. STAT. § 760.02(6) (1987).

143. DADE COUNTY, FLA. CODE § 11A-2(10) (1977).

144. *Burroughs*, 578 So. 2d at 855.

145. *Id.* at 856.

146. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188(f) (1981).

termination of the employment.[147] Under the common law of contracts, a non-competition clause constitutes a restraint of trade and its terms will be enforced only if it is reasonable.[148] Generally, where an anti-competition covenant given by an employee to his employer is involved, a stricter standard of reasonableness will be applied.[149]

Florida, by statute in derogation of common law restraints, allows an employee to agree with his employer to "refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area."[150] This statute, which is enforceable by injunction, has been upheld by the Florida Supreme Court.[151] Several recent cases have involved some aspect of non-competition clauses in employment contracts.

In *Florida Pest Control & Chemical Co. v. Thomas*,[152] the branch manager's employment contract expressly provided in paragraph 7(c), among other restrictions, that for two years following his termination, Thomas would not "become employed in any manner by any competitor of [the] company." Subsequently, Thomas was terminated and both parties sought judicial clarification of the status of the non-competition clauses.[153]

Although the trial court enforced the other restrictions on Thomas's post-employment conduct, it ruled that paragraph 7(c) was overbroad.[154] On appeal, the district court reversed and enforced all of the covenants including those contained in paragraph 7(c). Where contract language is clear and unambiguous, the court ruled, the trial court must enforce the term even if it believes that it is oppressive to the employee.[155] Furthermore, based on Florida Statutes, section

147. *Id.* at § 188(g).

148. Standard Newspapers v. Woods, 110 So. 2d 397, 399 (Fla. 1959) ("under the common law . . . contracts restricting a man's right to follow his calling were considered void as against public policy," and "reluctance on the part of courts to enforce contracts likely to . . . interfere with a person's right to make a living").

149. Reed, Roberts Assoc. Inc. v. Strauman, 40 N.Y.2d 303, 353 N.E.2d 590, 386 N.Y.S.2d 677 (NY 1976).

150. FLA. STAT. § 542.33(2)(A) (1987).

151. *See* Capelouto v. Orkin Exterminating Co., 183 So. 2d 532 (Fla.), *appeal dismissed*, 385 U.S. 11 (1966); Miller Mechanical, Inc. v. Ruth, 300 So. 2d 11 (Fla. 1974).

152. 520 So. 2d 669 (Fla. 1st Dist. Ct. App. 1988).

153. *Id.* at 670.

154. *Id.*

155. The court relied on the following Florida cases: Twenty-four Collection, Inc. v. Keller, 389 So. 2d 1062, 1063 (Fla. 3d Dist. Ct. App. 1980), *petition for rev. dis-*

542.33(2)(a) endorsing non-competition clauses, the court reasoned that the only discretion left to a court is to determine whether the time and space restrictions are reasonable. If they are, "the trial court has no power to do anything but enforce the terms of the covenant *as written* by injunction."[156]

The dissenting opinion believed that the trial court exercised lawful discretion in refusing to enforce paragraph 7(c).[157] Since injunctive relief is equitable, courts retain inherent discretion, even in the face of legislation, to determine whether certain restrictions on earning a livelihood are premised on a showing that, unless enforced, irreparable injury to the employer will result.[158]

Two other related cases did not involve express non-competition clauses: *Keel v. Quality Medical Systems, Inc.*[159] and *Blackstone v. Dade City Osteopathic Clinic.*[160] Both addressed the more general question of the circumstances under which an employer's customer list gains protection as a trade secret. Although Florida law provides that a list of customers may be a trade secret, this assumes that the employer has taken measures to keep the information confidential.[161] Certainly, a promise by an employee not to disclose a trade secret or confidential information will be enforced.[162] Moreover, "even in the absence of an express agreement, employees may not, even after termination of employment, disclose or make use of trade secrets, including secret customer lists."[163] Both of the following cases fall under this latter category.

In *Keel* the trial court enjoined an employee from seeking business from his former employer's existing customers. The district court reversed because there was no evidence that the customer information

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missed, 419 So. 2d 1048 (Fla. 1982); Rollins Protective Servs. Co. v. Lammons, 472 So. 2d 812, 813 (Fla. 5th Dist. Ct. App. 1985). This position seems untenable in light of the fact that non-competition clauses are valid only to the extent they are reasonable. If a restriction appears to a court to be oppressive, is this not merely another way of saying that the restriction is unreasonable? *See* J. CALAMARI AND J. PERILLO, THE LAW OF CONTRACTS, 602-03 (2d ed. 1977).

156. *Thomas*, 520 So. 2d at 671.
157. *Id.*
158. *Id.* at 672. (Wentworth, J., dissenting).
159. 515 So. 2d 337 (Fla. 3d Dist. Ct. App. 1987).
160. 511 So. 2d 1050 (Fla. 2d Dist. Ct. App. 1987).
161. FLA. STAT. § 812.081(1)(c) (1987).
162. McCall Co. v. Wright, 198 N.Y. 143, 91 N.E. 516 (NY 1910).
163. J. CALAMARI AND J. PERILLO, *supra* note 155, at 601.

was confidential or that the information was a business or trade secret.[164]

Similarly, in *Blackstone*, the employment contract did not include any noncompetitive covenant. After the Clinic terminated Blackstone's employment, the former independent contractor began osteopathic practice with another local osteopathic physician. In the ensuing litigation, the Clinic claimed that Blackstone had stolen a customer list in violation of Florida's trade secret statute.[165]

The trial court, after a non-jury trial, ruled in favor of the Clinic, awarding both compensatory and punitive damages. On appeal, the district court found the absence of a noncompetition clause relevant in reversing the trial court. Whether as an independent contractor or as an employee, the court concluded that Blackstone was not restrained from notifying his former patients of the new location of his practice. The court distinguished the present case from the facts in *Unistar Corp. v. Child*[166] where the court found that a customer list reflected "considerable effort, knowledge, time and expense on the part of the plaintiff."[167] In the present case, by contrast, the names of the Clinic's patients were compiled by Blackstone from patients themselves, from the phone book, and from his own memory.[168]

NEGLIGENT HIRING, SUPERVISION AND RETENTION

Several cases have considered an employer's liability for failing to properly investigate an employee's violent propensities which erupt in the course of his or her employment resulting in some injury being sustained by a third party.[169]

Walsingham v. Browning[170] involved a fight at the Thunderbird Lounge between some customers and Tawes, the security guard hired by Browning, the owner of the lounge. The injured customers sued

164. *Keel*, 515 So. 2d at 338.
165. *Blackstone*, 511 So. 2d at 1051.
166. 415 So. 2d 733 (Fla. 3d Dist. Ct. App. 1982).
167. *Id.* at 734.
168. *Blackstone*, 511 So. 2d at 1052.
169. A second category of negligent hiring cases exists. The violent employee injures a co-employee rather than a third party raising the issue of the exclusivity of workers' compensation for the injured employee. None of the present Florida cases under discussion involved this second category.
170. 525 So. 2d 896 (Fla. 1st Dist. Ct. App. 1988).

Tawes for battery and in a separate action sued Browning for his negligent supervision of Tawes. The battery claim was dismissed as the result of a release and settlement executed by Tawes and the customers. Browning argued that this release of Tawes also released the employer of any liability based on negligent supervision.

The trial court agreed with the employer that under the doctrine of vicarious liability or respondeat superior the employer has no liability if the employee has no liability.[171] The district court reversed without necessarily disagreeing with the trial court's analysis. True, the district court stated, an employer is not liable if his employee is not liable. However, the release and settlement here did not mean that Tawes was blameless — only that he had no liability for the intentional tort of battery. The separate claim against the employer, however, was based on negligence, for which Tawes had not been absolved. Consequently, the court permitted the negligent supervision suit to proceed.[172]

The question of whether a school board may successfully assert sovereign immunity to defeat a suit alleging negligent retention and supervision of a teacher was answered in the negative in *School Board v. Coffey*.[173] A jury found both the school board and the superintendent negligent in the retention and supervision of a school teacher who sexually abused a student. The district court affirmed, noting that public and private employers have an identical duty when it is foreseeable that an employee's actions can cause injuries to third parties.[174] In *Doe v. Ft. Lauderdale Medical Center Management, Inc.*,[175] Bieber, the job interviewer for the medical center who represented himself as a doctor to interviewees, committed a sexual battery upon Jane Doe when she interviewed at the center for a job. The evidence revealed that the medical center was aware that Bieber had represented himself as a doctor in the past and in fact had been reprimanded by his supervisor. The district court permitted the case to proceed under three overlapping causes of action: 1) respondeat superior, based on apparent authority; 2) negligent supervision or retention; and 3) breach of an implied contract to protect third parties visiting the medical center.[176] This last

171. *Id.* at 997 (citing Mallory v. O'Neil, 69 So. 2d 313 (Fla. 1954)).
172. *Id.* at 998.
173. 524 So. 2d 1052 (Fla. 5th Dist. Ct. App. 1988).
174. *Id.* at 1053.
175. 522 So. 2d 80 (Fla. 4th Dist. Ct. App. 1988).

nascent theory has yet to form the basis of a decision in Florida.[177]

Finally, the availability of punitive damages against an employer for negligent hiring was considered in *Johnson v. Florida Farm Bureau Casualty Insurance Co.*[178] The driver of a tractor-trailer ran over and killed a child. On the basis of a blood test, the driver was found to have been legally intoxicated at the time of the accident. The personal representative of the estate of the child convinced the court that the driver's employer knew or should have known that the employee had a propensity to drink and drive. The court imposed punitive damages upon both the employer and the vehicle owner.[179]

The second district decided that an employer must have constructive or actual notice of the employee's unfitness to work in order to impose liability based on negligent retention or supervision.[180] Moreover, some fault on the employer's part must be shown to impose punitive damages based on this theory.[181]

DEFAMATION AND TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIP

Often a prospective employer will ask a former employer for his or her frank evaluation of an employee's job performance as part of the hiring process. Sometimes, a reference will include inaccuracies, unjust statements, or ruinous accusations. Courts have used the law of defamation and privacy to prevent abuses and to compensate employees for injuries to careers.[182] However, the use of these torts is limited by the employer's "qualified privilege" to defame which developed, in part, to promote the flow of relevant information from one employer to another.[183]

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177. The court added, however, that several Florida decisions have noted the theory. *See* Stone v. William M. Eisen Co,, 219 N.Y. 205, 114 N.E. 44 (N.Y. 1916); Martin v. United Security Services, Inc., 373 So. 2d 720 (Fla. 1st Dist Ct. App.1979) (Erwin, J., concurring specially); Nazareth v. Herndon Ambulance Service, Inc., 467 So. 2d 1076, 1079 (Fla. 5th Dist. Ct. App.), *rev. denied*, 478 So. 2d 53 (Fla. 1985).

178. 13 Fla. L. Weekly 245 (Fla. 4th Dist. Ct. App. 1988).

179. *Id.*

180. M.V. v. Gulf Ridge Council Boy Scouts Of America, 529 So. 2d 1248 (Fla. 2d Dist. Ct. App. 1988).

181. *Id.*

182. Comment, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143 (1977).

183. *Id.*

The components of the qualified privilege of the employer to defame were analyzed in the recent Florida case of *Nowik v. Mazda Motors*.[184] After two and one half years working for Mazda, Nowik was terminated by his supervisor. It was unclear whether the termination was motivated by the supervisor's personal dislike of Nowik or by the supervisor's legitimate dissatisfaction with his job performance.[185] When Nowik sought a new job with Heavy Equipment Repair, the interviewer Moss testified that the only reason Nowik did not get the job was because of a negative reference by Bramble. Mazda's reference stated that "although Nowik's knowledge of his job was good, his attitude, dependability, and quantity of work were fair, and his work quality and adaptability to the job were poor."[186]

Nowik sued, alleging defamation because the statements were untrue and malicious. Mazda defended on three grounds: 1) the statements were true; 2) the statements were protected by a qualified privilege; and 3) the statements, as matters of pure opinion, could not be defamatory. The district court set forth the elements making up the qualified privilege: (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner.[187] The court ruled that a jury could infer malice since Nowik's district sales figures were very high and another Mazda supervisor testified that Nowik's job attitude was "great." Although statements of pure opinion do not constitute defamation,[188] the court characterized Bramble's statements as mixed expressions of law and fact and the issue of fact must be submitted to the jury.[189]

The district court also allowed the claim of tortious interference with an advantageous business relationship to proceed to trial. Mazda disputed whether a prima facie case could be shown since Nowik, as a job applicant, had no existing business relationship with Heavy Equipment Repair. The court ruled that the tort could be established without

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184. 523 So. 2d 769 (Fla. 1st Dist. Ct. App. 1988).
185. *Id.* at 767-70.
186. *Id.* at 770.
187. *Id.* (quoting Lundquist v. Alewine, 397 So. 2d 1148, 1149 (Fla. 5th Dist. Ct. App. 1981) (citing Leonard v. Wilson, 150 Fla. 503, 8 So. 2d 12 (Fla. 1942))).
188. Eastern Airlines, Inc. v. Gellert, 438 So. 2d 923 (Fla. 3d Dist. Ct. App. 1983).
189. *Nowick*, 523 So. 2d at 771.

Nowik actually being hired if Mazda "maliciously interfered with his legitimate efforts to secure employment."[190]

190. *Id.*