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## 2004 Survey of Florida Public Employment Law

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# 2004 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

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## I. INTRODUCTION

This survey article aims at conveying a sense of key developments and events in public sector labor and employment law during 2003–2004. While the focus is on Florida and the public sector, this article also mingles federal legislation and case law that affects Florida public employment. Major Eleventh Circuit cases, even if they originate in Georgia or Alabama, are included because such precedents are equally binding in Florida.

Part II highlights developments involving the hiring phase of employment, such as background checks of prospective employees and summarizes federal and state legislation aimed at restricting genetic and HIV screening. Privatization and outsourcing—trends that began in earnest during the 1980s in an effort to downsize government and cut costs—remain ripe topics today. Part II also covers conflicts of interest regulation, the ease with which discharged police officers are rehired, and claims that a state judge illegally resides far from the bench where he sits.

Part III, terms of employment, begins by summarizing landmark regulations that took effect August 23, 2004, which radically overhauled overtime rules for millions of employees, including police officers and firefighters. Other wage issues are also covered, such as proposed amendments of the Equal Pay Act<sup>1</sup> and teachers' salaries. Part III also covers key developments in employee benefits, from public pension plans and health insurance to family medical leave, workers' compensation, and unemployment compensation. In addition, Part III touches on new ways of conducting drug tests on public employees and privacy concerns raised by employees' e-mail. This section concludes with a look at health and safety concerns and a miscellany of other hard-to-categorize workplace issues.

Part IV takes a look at constitutional challenges public employees may raise, primarily free speech and due process issues. The heart of Part IV, however, deals with employment discrimination. Additionally, Part IV not only discusses such staples as race, sex, and religious bias claims commonly

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1. Equal Pay Act of 1963, 29 U.S.C. § 206 (2000).

addressed under Title VII of the Civil Rights Act of 1964<sup>2</sup>, but other forms of discrimination such as age and disability arising under separate federal statutes. Moreover, this section summarizes the number of cities and states that offer protection for gay and lesbian workers. Part IV concludes appropriately with a glance toward remedies, where proposed federal legislation, if enacted, would amend the Federal Arbitration Act<sup>3</sup> to exclude employment contracts and would eliminate altogether the existing cap on damages recoverable for violations of Title VII.

## II. HIRING, PRIVATIZATION, SCREENING, ETHICS, & RESIDENCE

### A. *Background Checks and Genetic and HIV Screening*

While privacy concerns are always at stake whenever public employees come under scrutiny, the constitutionality of background investigations has been upheld. Nevertheless, eighty-five percent of all employers do not investigate prospective employees.<sup>4</sup>

As a practical matter, employers are advised to conduct background investigations as a strategy for avoiding liability stemming from negligent hiring. In 2003, Florida's juvenile justice chief implemented a plan to weed out convicted felons who supervise delinquent youths.<sup>5</sup> In place of the current five-year screenings, the new policy screens all juvenile detention workers annually for arrests.<sup>6</sup> A study conducted by the Miami Herald revealed that about 350 out of 2000 detention workers and supervisors statewide have arrest records.<sup>7</sup> Among other proposals, the department will require employees to sign forms agreeing that they must alert the department of an arrest, or else be fired.<sup>8</sup> Moreover, the department is drafting a psychological test to screen out candidates prone to excessive use of force.<sup>9</sup> In 2004, a Florida State House committee adopted a bill that would require public agencies to

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2. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–2000h–6 (2000).

3. See 9 U.S.C. §§ 1–307 (2000).

4. Beatrice Garcia, *Background? Check It Out*, MIAMI HERALD, Oct. 12, 1999, at 1C. But, after the 9/11 terrorist attacks, far more employers are conducting background checks as a routine matter. Eve Tahmincioglu, *Tense Employers Step Up Background Checks*, N.Y. TIMES, Oct. 3, 2001, at C9.

5. Tina Cummings & Carol Marbin Miller, *Detention Workers to Have Yearly Arrest Screenings*, MIAMI HERALD, Dec. 11, 2003, at 1B.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

undertake a background check of anyone who works or volunteers at parks, playgrounds, child care centers, or other venues where children meet.<sup>10</sup>

Another emerging form of screening that employers sometimes conduct at the hiring stage is known as genetic testing. The aim of this type of testing is to identify employees who may be prone to disease. While there are salutary reasons to conduct genetic testing, such as monitoring the impact of employee exposure to workplace toxins, it can also be enlisted to weed out disease-prone applicants in an effort to reduce health costs. Public employees have successfully contested genetic testing on constitutional grounds, arguing that it is a due process violation and an unreasonable search and seizure.<sup>11</sup>

Legislative efforts at the federal level have aimed at restricting the use of genetic screening. On October 14, 2003, the United States Senate passed a bill that prohibits employers from relying on individuals' genetic data when making hiring, firing, job assignment, or promotion decisions.<sup>12</sup>

Like genetic testing, screening for HIV can be motivated by salutary or harmful purposes. Under Florida law, HIV test results may "not be used to determine if a person may be insured for disability, health, or life insurance or to screen or determine suitability for, or to discharge a person from, employment."<sup>13</sup>

Among other things, the Fair Credit Reporting Act<sup>14</sup> regulates the information that can be collected by investigators while conducting background checks on job applicants.<sup>15</sup> Under the Act, employers must notify the targeted applicant or employee before conducting an investigation that enlists outside investigators, secure the individual's prior consent, and fully disclose investigative reports before disciplining an employee.<sup>16</sup> In other words, "an employee or job applicant can't be investigated for any wrongdoing—including sexual harassment—without the target's permission."<sup>17</sup> Employers have asked Congress to exempt some employee investigations from the prior-approval rule, in addition to those probes involving employee misconduct and violations of state or federal laws.<sup>18</sup>

10. *Child Protection: Background Checks Urged for Workers*, MIAMI HERALD, Mar. 17, 2004, at 9B.

11. *See* Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1275 (9th Cir. 1998).

12. *See* S. 1053, 108th Cong. § 202 (2003).

13. FLA. STAT. § 381.004(4)(d) (2003).

14. *See* Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681u (2000).

15. Kathy M. Kristof, *Credit Reporting Act Would Null Tough State Laws*, L.A. TIMES, Nov. 30, 2003, at C3.

16. *See* §§ 1681–1681u.

17. Kristof, *supra* note 15.

18. *Id.*

## B. *Privatization and Outsourcing*

One of the definitions of privatization is “[t]he contracting out of functions previously performed by government to one or more private providers.”<sup>19</sup> The 1980s witnessed a dramatic increase in contracting out of public services, ranging from janitorial services and garbage collection to school and prison administration.<sup>20</sup> Despite this trend, one occupation where the reverse is true, i.e. private jobs turning public, involves airport security, which came about largely due to 9/11.

When it comes to other airport positions, however, the pressure has been toward privatization.<sup>21</sup> For example, the Bush Administration vowed in 2003 to veto an aviation bill unless the Federal Aviation Administration (FAA) was authorized to let private operators manage government-run air traffic control towers.<sup>22</sup> This issue of whether air traffic controllers should be public or private employees goes back to 1981 when President Reagan fired striking controllers.<sup>23</sup> A union representing controllers sued the government in an Ohio federal court, alleging that privatizing control towers is illegal.<sup>24</sup> Some claim that the FAA’s goal of staffing small control towers with privately employed workers will reduce safety.<sup>25</sup> The FAA looks to save one million dollars per private tower.<sup>26</sup> Today 219 of the 484 public airports have contracted with private controllers.<sup>27</sup> President Bush has steadily chipped away at President Clinton’s Executive Order protecting air traffic controllers from privatization.<sup>28</sup>

Long waits at airports have led to some in Congress to call for privatizing airport security screeners.<sup>29</sup> Orlando’s airport has faced persistent problems adjusting staffing to meet demand, and Miami International Airport is seriously considering privatizing its screening positions.<sup>30</sup> Congress has

19. Brian Clemow, *Privatization and the Public Good*, 43 LAB. L.J. 344 (1992).

20. See, e.g., Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 33 FED B. NEWS & J. 194 (1986) (discussing the new emerging concept of privatization of correctional facilities, also known as “prisons for profit”).

21. Leslie Miller, *Controllers, Government Revive Old Dispute*, MIAMI HERALD, Sept. 25, 2003, at 7A.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Miller, *supra* note 21.

27. *Id.*

28. *Id.*

29. Leslie Miller, *Airports May Dump Federal Workers*, MIAMI HERALD, Mar. 26, 2004, at 1C.

30. *Id.*

given airports the option of returning to private screening.<sup>31</sup> The Jacksonville Airport Authority, plagued by too many managers, and too few screeners, is likely to opt out of government screening entirely.<sup>32</sup>

In the face of budget shortfalls, privatizing city services is often seen as an obvious way of saving money.<sup>33</sup> Fort Lauderdale, for example, is considering hiring a security company to respond to home alarms, instead of relying on city police.<sup>34</sup> In addition, the city is assessing whether to contract-out utility bill collections and management of city pools.<sup>35</sup> Parking enforcement, the city's most profitable enterprise, is the least likely candidate for privatization.<sup>36</sup>

Two synonyms for privatization, outsourcing and offshoring, have fueled debate as American jobs continue to disappear at home, and reappear overseas. By one estimate, at least fifteen percent of the three million jobs lost in the United States since 2000 have been outsourced to foreign markets.<sup>37</sup> As public resentment against outsourcing has mounted, federal and state legislatures have proposed measures to reduce the practice.<sup>38</sup> In Florida, critics of outsourcing argue that the state should not do business with companies that outsource their labor needs to foreign workers.<sup>39</sup> To date, however, bills requiring state contractors to hire U.S. workers have not become law.<sup>40</sup> In 1996, the Florida Department of Children and Families turned to a private company to end the agency's reliance on paper food stamps and welfare checks—saving the state four million dollars a year.<sup>41</sup> Similarly, in 2000, the state contracted with a company that subcontracts in India to identify “welfare fraud and mistakes.”<sup>42</sup> Despite the fact that these services have never been performed by state employees, Florida has continually laid-off state employees who deal with welfare and food stamps programs.<sup>43</sup>

31. *Id.*

32. *Id.*

33. *See, e.g.,* Natalie P. McNeal, *Mayor Brings Up the Possibility of Privatizing Some City Services*, MIAMI HERALD, Feb. 26, 2004, at 5B.

34. *Id.*

35. *Id.*

36. *Id.*

37. Louis Uchitelle, *A Statistic that's Missing: Jobs that Moved Overseas*, N.Y. TIMES, Oct. 5, 2003, at A20.

38. David Streitfeld, *Indian City Rides Tech Euphoria*, L.A. TIMES, June 30, 2004, at A1.

39. Kathleen Chapman, *State Hot Line Takes Callers Around World*, MIAMI HERALD, May 10, 2004, at 8B.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

### C. *Ethics*

Federal law prohibits presidential appointees from commenting on potential employment with companies doing business with, or hoping to be doing business with agencies headed by those officials.<sup>44</sup> In January 2004, the White House made a change in ethics rules by ordering all federal agencies to no longer issue ethics waivers that enable presidential appointees to negotiate positions with private firms while they are managing federal policies vital to the potential employers.<sup>45</sup> The move was portrayed as an “effort to strengthen government ethics.”<sup>46</sup>

Most states have enacted so-called codes of governmental ethics.<sup>47</sup> In 2003, “44 states required their employees to undergo ethics training . . . [b]ut only 16 states make such training mandatory.”<sup>48</sup> Public officials are held to a higher standard of ethics than rank and file public employees on grounds that the former owe a fiduciary duty to the electorate.<sup>49</sup> “[A]ll 50 states regulate the conduct of their public officials . . . .”<sup>50</sup>

In Florida, a variety of government ethics issues have arisen recently, from a state supreme court ruling on the definition of bribery of a government official,<sup>51</sup> to an ethics law forcing “government officials to publicly disclose gifts they receive” from non-relatives.<sup>52</sup>

The Supreme Court of Florida case involved a police officer who was convicted of unlawful compensation, i.e. a form of bribery, for letting a female drunk driver go free after having sex with her.<sup>53</sup> Because the police officer never explicitly said he would arrest her if she refused to have sex with him, the Third District Court of Appeal reversed the officer’s conviction.<sup>54</sup> On appeal, the state high court unanimously overturned this decision, ruling that prosecutors need not prove public officials talked explicitly about a quid pro quo to convict them.<sup>55</sup> Circumstantial evidence of intent is suffi-

44. Amy Goldstein, *White House Halts Job-Hunting Waivers*, MIAMI HERALD, Jan. 15, 2004, at 9A.

45. *Id.*

46. *Id.*

47. See P. J. Huffstutter, *Illinois Takes on Its Culture of Scandal*, L.A. TIMES, Apr. 4, 2004, at A24.

48. See *id.*

49. *Id.*

50. *Id.*

51. *State v. Castillo*, 877 So. 2d 690 (Fla. 2004).

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

53. Jay Weaver, *Burden of Proof Lightened*, MIAMI HERALD, Apr. 23, 2004, at 5B.

54. *Id.*

55. *Id.*



cient: there need be no spoken understanding to show a gift was exchanged for a favor.<sup>56</sup>

Part of Florida's ethics law regulates gift-giving to government officials.<sup>57</sup> The gift law aims at limiting gifts to public officials from lobbyists, developers, or city contractors, and at making public any gifts officials receive from others so that voters can assess their propriety.<sup>58</sup> But experts who know the law say it is confusing and often disregarded.<sup>59</sup> For example, are paid trips that mix business with pleasure gifts that must be disclosed to the Florida Commission on Ethics? Opinion varies.<sup>60</sup> The law has other shortcomings as well, for example, it shifts the burden of reporting minor gifts from lobbyists, not on the public official, but on the gift-giver.<sup>61</sup> Voters learn the name of the lobbyist but not the official who received the gift.<sup>62</sup> Thus, public oversight of official conduct is compromised.

#### D. *Rehiring Fired Employees*

In 2002, the Broward Sheriff's Office recommended the discharge of fifty police officers for an array of misconduct "ranging from drug use to false imprisonment to improper display of a firearm."<sup>63</sup> A dismissed officer can trigger a grievance procedure, but even if he loses, the officer is entitled to a full due process hearing before an arbitrator.<sup>64</sup> Even if the arbitrator sustains the dismissal, the officer is still free to seek a job as a police officer elsewhere, unless he is decertified by the Florida Department of Law Enforcement.<sup>65</sup>

While the burden of proof at arbitration is by preponderance of the evidence, there must be clear and convincing evidence before an officer's license is revoked.<sup>66</sup> According to a study undertaken by the Miami Herald, many fired police officers are rehired, either involuntarily forced upon a department by an arbitrator or voluntarily hired by another city.<sup>67</sup> A strong

56. *Id.*

57. Andron, *supra* note 52.

58. *Id.*

59. *Id.*

60. *See id.*

61. *Id.*

62. Andron, *supra* note 52.

63. Wanda J. DeMarzo & Daniel de Vise, *In BSO, Fired Officers Routinely Rehired*, MIAMI HERALD, Sept. 29, 2003, at 14A.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

police union, which zealously defends its members, and a grievance procedure, that tilts in favor of officers, is blamed for this result.<sup>68</sup>

Several Florida police departments have turned to early intervention systems to identify bad police officers or those with potential problems.<sup>69</sup> Such systems have turned up a surprising predictor: that many officers in trouble have exhausted not only their “sick leave, [but also their] vacation and compensatory time.”<sup>70</sup>

### E. *Residence*

There is a growing trend toward establishing residency requirements for public employment on the assumption that employees should have a stake in the economic health of the community from which they draw their salaries. These requirements will play a vital role in addressing economic and social issues of the communities in which residents earn their livelihood. Residency is often defined as a person’s permanent place of abode.<sup>71</sup> Proof of residency can range from receipt of mailing, to voter registration or utility statements.<sup>72</sup> Proof of residency ensures against workers maintaining a phantom address within one city, for example, while the family and the employee actually reside in another.<sup>73</sup>

These factors governing residency came into play in Florida in 2003 with regard to a Third District Court of Appeal’s judge who was accused of illegally living four hundred miles north of the bench upon which he sat.<sup>74</sup> The allegation was that the judge and his family lived in Gainesville while he decided appellate cases in Miami-Dade and Monroe counties.<sup>75</sup> While the judge held a one-third interest in a condominium on Miami Beach and had avowed that the Miami address was his permanent homestead for property tax purposes,<sup>76</sup> the legal question boiled down to whether there was intent to make the Miami condo his actual residence.

68. See Demarzo & de Vise, *supra* note 63 (stating they found “case after case of fired officers who were promptly rehired”).

69. Wanda J. DeMarzo & Daniel de Vise, *Cities Turn to Early Intervention*, MIAMI HERALD, Sept. 29, 2003, at 14A.

70. *Id.*

71. BLACK’S LAW DICTIONARY 1335 (8th ed. 2004).

72. See *id.*; see also Steinhardt v. Batt, 753 So. 2d 928, 930–31 (La. Ct. App. 2000) (stating that defendant had acquired residency from receipt of mailing and utility bills).

73. See *id.*

74. *Critic Says Judge Has Illegal Residence*, MIAMI HERALD, Sept. 11, 2003, at 3B.

75. *Id.*

76. *Id.*

## III. TERMS OF EMPLOYMENT

A. *Hours and Wages*

## 1. Fair Labor Standards Act

Under the Fair Labor Standards Act, the rule of thumb in the public sector is that employees who work over forty hours a week are entitled either to time-and-a-half pay or to compensatory time off.<sup>77</sup> The largest category of employees who are exempt from overtime pay are salaried workers in certain executive, administrative, or professional posts.<sup>78</sup> Under regulations that have not been revised in fifty years, many inequities and criticisms have emerged.<sup>79</sup> For example, “[t]he pay level below which [employees] are automatically eligible for overtime pay” has stagnated at \$8060, leaving some assistant managers, with salaries of around \$20,000, ineligible for overtime pay, even if they put in sixty hour weeks.<sup>80</sup> Moreover, critics claimed the regulations were so unclear that they generated a flood of litigation.<sup>81</sup>

In response to growing criticism and increasing litigation over archaic overtime rules, the Bush Administration issued draft regulations in 2003 aimed at modernizing and simplifying rules governing over one hundred million employees.<sup>82</sup> The proposed rules, over five hundred pages long, prompted an excess of seventy-five thousand e-mail messages and letters commenting on the draft.<sup>83</sup> A fairly non-controversial feature of the draft involved raising the threshold below which employees are automatically eligible for overtime pay from \$8060 to \$23,660.<sup>84</sup> A controversial feature of the draft was the proposal to disqualify virtually every employee earning over \$65,000 a year for overtime pay.<sup>85</sup> Under the old rules there was no ceiling.<sup>86</sup> Moreover, critics claimed it was unclear which employees earning between the floor and the ceiling in the new rules would be eligible for overtime pay.<sup>87</sup> Police officers and fire fighters, among other higher-paid blue-

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77. Steven Greenhouse, *Labor Dept. Revises Plans to Cut Overtime Eligibility*, N.Y. TIMES, Apr. 21, 2004, at A14.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Greenhouse, *supra* note 77.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Greenhouse, *supra* note 77.

collar employees, feared that the proposed rules rendered them ineligible for overtime pay.<sup>88</sup> All told, critics claimed the proposed rules threatened overtime pay for as many as eight million employees.<sup>89</sup> In the United States, a corporate tax bill was delayed by Democrats who insisted that the proposed overtime rules leave those workers currently entitled to overtime pay as eligible.<sup>90</sup>

In response to these pressures and criticisms over the draft, the Labor Department issued revisions that have only partially allayed concerns.<sup>91</sup> For one thing, in April 2004 the Secretary of Labor made clear that police officers and firefighters would still qualify for overtime pay.<sup>92</sup> For another, the revisions increased from \$65,000 to \$100,000, the amount that would almost automatically disqualify a worker from overtime pay.<sup>93</sup> Only white-collar workers covered by a union contract that ensures overtime pay for those earning over \$100,000 would continue to be eligible.<sup>94</sup> Despite these concessions, it still took a vote in the Senate on May 4, 2004, to guarantee the right to overtime pay for all employees who are currently eligible.<sup>95</sup> The revised overtime pay regulations go into effect August 23, 2004.<sup>96</sup> It will be miraculous if the five hundred page document does not generate its share of litigation.

Apart from federal overtime pay overhaul, there were three noteworthy Eleventh Circuit Court decisions that were handed down over the last year that bear on the Fair Labor Standards Act (FLSA).<sup>97</sup> Two involve FLSA collective actions<sup>98</sup> and the third deals with FLSA remedies.<sup>99</sup>

Under the FLSA, a group of employees are entitled to sue to recover wages even though such a suit is not, strictly speaking, a class as defined in rule 23 of the *Federal Rules of Civil Procedure*.<sup>100</sup> The difference is that an

88. *Id.*

89. Mary Dalrymple, *Tax Bill Stalls; OT Pay Tariffs at Issue*, MIAMI HERALD, Mar. 25, 2004, at 3A.

90. *Id.*

91. Greenhouse, *supra* note 77.

92. *Id.*

93. *Id.*

94. *Id.*

95. David Espo, *Senate Opposes OT-Rule Changes*, MIAMI HERALD, May 5, 2004, at 3C.

96. Harry Wessel, *OT May Fatten Adjusters' Pay*, ORLANDO SENTINEL, Sept. 11, 2004, at C1.

97. *Prickett v. DeKalb County, Ga.*, 349 F.3d 1294 (11th Cir. 2003); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240 (11th Cir. 2003); *Barragan v. LCT Transp. Servs., Inc.*, No. 02-15542-HH, 2002 WL 32172203, at \*2 (11th Cir. Dec. 10, 2002).

98. *Prickett*, 349 F.3d at 1249; *Cameron-Grant*, 347 F.3d at 1240.

99. *Barragan*, 2002 WL 32172203, at \*2.

100. 29 U.S.C. § 216(b) (1998).

employee must opt-in to become a member of a FLSA class, while a member of a rule 23 class must request exclusion to avoid becoming a member.<sup>101</sup> In *Cameron-Grant v. Maxim Healthcare Services Inc.*,<sup>102</sup> the Eleventh Circuit ruled that a named plaintiff in a FLSA collective action cannot alert other class members of a possible case after his own claims have been settled.<sup>103</sup> In *Prickett v. DeKalb County, Georgia*,<sup>104</sup> the court ruled that opt-ins to a FLSA collective action need not file additional consent forms when an additional FLSA claim is added to a case.<sup>105</sup>

The third Eleventh Circuit case involved the awarding of attorneys' fees under the FLSA.<sup>106</sup> The only time a prevailing employer is entitled to recover attorneys' fees under the Act is when the employee acted in bad faith.<sup>107</sup> In *LCT Transportation Services, Inc. v. Barragan*,<sup>108</sup> the court ruled that an employer must identify a specific Department of Labor opinion to establish a good faith defense.<sup>109</sup> Under the FLSA, the amount of reasonable attorney's fees is left to the sound discretion of the trial court.<sup>110</sup> In *Barragan*, the court also recognized that in assessing attorneys' fees the court may exclude compensation for excessive hours and may take into account the fact that the litigation was decidedly vexatious.<sup>111</sup>

## 2. Equal Pay Act

The Equal Pay Act (EPA) guarantees that men and women performing substantially the same work are paid equally.<sup>112</sup> Under the EPA, employees may bring suit only for back wages and for liquidated damages (plus attorneys' fees and court costs).<sup>113</sup> But under proposed federal legislation, the Civil Rights Act of 2004, the EPA would be amended to provide for com-

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101. See, e.g., *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977).

102. 347 F.3d 1240 (11th Cir. 2003).

103. *Id.* at 1249.

104. 349 F.3d 1294 (11th Cir. 2003).

105. *Id.* at 1298.

106. *Barragan*, 2002 WL 32172203, at \*2.

107. 48 AM. JUR., *Labor and Labor Relations* § 4705 (2004) (citing *McBride v. Cox*, 567 N.E.2d 130, 134 (Ind. Ct. App. 1991)).

108. No. 03-3, 2003 WL 22428397, at\*1 (June 25, 2003).

109. *Id.* at \*12-13.

110. 29 U.S.C. § 216(b) (2003).

111. *LCT Transp. Servs., Inc. v. Barragan*, No. 03-293, 2003 WL 22428892, at \*9 (Aug. 20, 2003).

112. 29 U.S.C. § 201 (2004).

113. *Id.*

pensatory and punitive damages and would bar employers from retaliating against employees who share wage information.<sup>114</sup>

### 3. Public Employee Wages

Studies undertaken over the last year have uncovered significant wage gaps. Nationally, women continue to lag behind men, earning twenty percent less than men.<sup>115</sup> Closer to home, Florida's average wage is only eighty-seven percent of the national average and about forty percent of Florida's workers earn less than nine dollars per hour.<sup>116</sup> To counter these trends, a coalition, Floridians For All, aims to raise the state minimum wage to \$6.15 per hour.<sup>117</sup> An estimated three hundred thousand state workers would receive an immediate wage increase.<sup>118</sup> At the high end of the income spectrum, a review of Florida's payroll records revealed that nine presidents of state public universities earned more than \$250,000 in 2003.<sup>119</sup> Despite these high salaries they remain below the national average, of course many state university athletic coaches earn far more, but the bulk of their pay comes from outside sources.<sup>120</sup>

In 2003, budget cuts in Fort Lauderdale led not only to the freezing of police officer's salaries, but also to layoffs, early retirements, and an abrupt halt in hiring.<sup>121</sup> Other public employees have fared better than Fort Lauderdale police officers when it comes to wages. In a controversial move Miramar city commissioners gave themselves a raise for the third time in three years.<sup>122</sup> However, in fairness it should be mentioned that the new salaries are comparable to what commissioners in other Southwest Broward cities earn.<sup>123</sup>

Under a plan hotly contested by the state's second-largest public employee labor union (because it rewards junior employees more than veteran

114. H.R. 3809, 108th Cong. § 603 (2004); S. 088, 108th Cong. § 603 (2004).

115. *Study Finds Women Still Earn 20% Less than Men*, MIAMI HERALD, Nov. 21, 2003, at 3C.

116. Gregg Fields, *Economic Diversity Lacks State Support, Leaders Say*, MIAMI HERALD, Sept. 5, 2003, at 1C.

117. Gregg Fields, *Hike in Minimum Wage Sought*, MIAMI HERALD, Oct. 23, 2003, at 3C.

118. *Id.*

119. Brent Kallestad, *University Leaders Among Highest Paid*, MIAMI HERALD, Feb. 23, 2004, at 8B.

120. *Id.*

121. Ashley Fantz, *Police Will Ax 42 Jobs, Shave \$6.3 Million*, MIAMI HERALD, Nov. 12, 2003, at 1B.

122. Natalie P. McNeal, *Miramar Leaders Seek Pay Hike Again*, MIAMI HERALD, Aug. 26, 2003, at 3B.

123. *Id.*

employees) hefty pay raises were proposed for three thousand employees who investigate child abuse or supervise children in foster care.<sup>124</sup> As is often the case, the goal is to bring the salaries of these public employees up to the national average.<sup>125</sup>

The final category of public employees whose wages are always widely publicized is that of public school teachers. The Miami-Dade school district awarded teachers not only two years' worth of raises, but also reduced their health insurance costs.<sup>126</sup> In February 2004, Broward County approved a contract giving teachers a nine percent raise over three years.<sup>127</sup> Moreover, the contract includes "[a] \$6000 incentive over three years for employees to move from a PPO to an HMO healthcare provider."<sup>128</sup>

### B. *Public Employee Pension Plans*

Many state and local governments, up against daunting pension obligations to public employees, have turned to selling bonds to keep their pension funds solvent.<sup>129</sup> Bond sales are attractive because they deliver ready cash, relieving budget pressures without added tax increases or cuts in retirement benefits.<sup>130</sup> The downside is that the strategy can fail, leaving taxpayers to pick up the tab.<sup>131</sup> For example, in California an unpopular bond sale for state employees' pension played a part in the recall of Governor Gray Davis.<sup>132</sup> In 2003, Pembroke Pines, Florida borrowed forty-five million dollars to fund a new pension plan for city firefighters.<sup>133</sup> The city will borrow the money through a bond issue, promising to repay the debt by tapping in-

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124. Carol Marbin Miller, *Welfare Workers' Raise Upsets Union*, MIAMI HERALD, Sept. 6, 2003, at 5B.

125. *Id.*

126. Matthew I. Pinzur, *Teachers, Aides to Get Sizable Raises*, MIAMI HERALD, Nov. 11, 2003, at 5B.

127. Mary Ellen Flannery, *Teachers OK Deal, but Some Still Upset*, MIAMI HERALD, Feb. 11, 2004, at 9B.

128. Steve Harrison & Mary Ellen Flannery, *Teachers Reach Deal on Raises; If the New Contract Deal is Formalized, Broward Teachers Would Get a Retroactive 3 Percent Raise for This Year*, MIAMI HERALD, Jan. 28, 2004, at B1.

129. Mary Williams Walsh, *States and Cities Risk Bigger Losses to Fund Pensions*, N.Y. TIMES, Oct. 12, 2003, at A1.

130. *Id.*

131. *Id.*

132. *Id.*

133. Scott Andron, *Bond Issue to Fund Pensions; The City is Going To Borrow Millions of Dollars, Not For a Bricks-and-Mortar Project, But To Increase Firefighter Benefits*, MIAMI HERALD, Sept. 18, 2003, at 2B.

come from consumers' utility taxes.<sup>134</sup> While risky, the bond issue will enable fire fighters to retire on eighty percent pay after twenty years.<sup>135</sup>

Florida's public pension fund, the fourth-largest in the United States, gained national attention on two matters in the past year. In 2003, federal auditors concluded that "Florida's public pension fund owe[d] the U.S. Department of Health and Human Services \$267 million" for excessive pension benefits paid to Florida employees who worked in federally funded programs.<sup>136</sup> In March 2004, the Florida pension plan joined a dozen other large investors in pledging to vote against Chairman Michael Eisner's reelection to the Walt Disney Board of Directors.<sup>137</sup> Despite this opposition, Eisner retained his seat.

Pension plans come in two types: defined benefit and defined contribution. Most public employee pension funds are defined benefit plans. Under such a plan, upon retirement an employee is entitled to a fixed share of her salary multiplied by the number of years of service. While in the last ten years, over seventeen thousand private employers have discontinued defined benefit plans, one of the few new plans was set up in 2003 for the police and firefighters of Lighthouse Point, Florida.<sup>138</sup>

Under many public pension plans, pension benefits received by the surviving spouse of a deceased plan member are terminated if he or she remarries. Arguably, this result prevents a surviving spouse from receiving benefits, which the decedent had earned over his or her working lifetime and penalizes surviving spouses who choose remarriage over widowhood. For example, in Fort Lauderdale, "widows whose spouses retired from the city before 1999" lose their survival benefits if they remarry.<sup>139</sup> This loss can be mitigated, some argue, by life insurance policies aimed at supporting surviving spouses.<sup>140</sup>

Many public pension plans integrate the payment of disability benefits with workers' compensation, social security, or other employer-provided disability programs. In many cases, for example, the sum of workers' compensation and pension benefits cannot exceed one hundred percent of the

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134. *Id.*

135. *Id.*

136. Joni James, *Audit: State Pension Fund Owes Feds \$267 Million*, MIAMI HERALD, Sept. 11, 2003, at 6B.

137. Claudia Eller, *Film Unit Caught in Crossfire; With Support for Eisner Eroding, 'The Alamo' and Other Big-Budget Bets Face Close Scrutiny*, L.A. TIMES, Mar. 2, 2004, at C1.

138. Mary Williams Walsh, *United Methodist Church Bucks the Trend on Employee Pensions*, N.Y. TIMES, May 21, 2004, at C1.

139. Ashley Fantz, *City Cool to Widows' Pension Plea*, MIAMI HERALD, Feb. 18, 2004, at 8B.

140. *Id.*



employee's salary at time of disability.<sup>141</sup> Under an 1890 federal law, retirement pay for disabled veterans "is reduced by a dollar for every dollar received in disability compensation."<sup>142</sup> United States House Minority Leader Nancy Pelosi, a California Democrat, is pushing to abolish this century-old tax policy.<sup>143</sup>

Pursuant to an August 2002 opinion by the federal Equal Employment Opportunity Commission (EEOC), it is illegal age discrimination for state or local governments to bar a worker from membership in a defined benefit pension plan on grounds of the employee's age at time of hire.<sup>144</sup> In light of this opinion, Fort Lauderdale and its public employee union are scrambling to include previously excluded older workers in the pension plan.<sup>145</sup> In July 2003, the city amended its laws excluding hirees older than fifty-five from pension eligibility to open membership to all hirees regardless of age.<sup>146</sup> The city will pick up the cost of past contributions for those over fifty-five years of age formerly excluded by its illegal policy.<sup>147</sup>

### C. Health Insurance

In 2002, forty-four million people were without health insurance, bringing the proportion of Americans who were uninsured to fifteen percent, up from fourteen percent in 2001.<sup>148</sup> The number of full-time employees lacking health insurance rose by about nine hundred thousand dollars in 2002, equaling approximately twenty million dollars.<sup>149</sup> The figure for Florida is worse than the national average: seventeen and one-half percent of Florida's residents are uninsured.<sup>150</sup> The higher number of uninsured is blamed on the tepid economy, layoffs, and employers' increasing refusal to pay soaring health insurance rates.<sup>151</sup> Average premiums rose almost fourteen percent in 2003, so more employers are shifting more of the costs onto their employees,

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141. *Barragan v. City of Miami*, 545 So. 2d 252, 255 (Fla. 1989).

142. Mitch Stacy, *'Tax' on Disabled Vets Decried*, MIAMI HERALD, Nov. 12, 2003, at 10B.

143. *Id.*

144. Sonji Jacobs, *Fort Lauderdale Looking to Place Older Workers in City Pension Plan*, MIAMI HERALD, Aug. 26, 2003, at 3B.

145. *Id.*

146. *Id.*

147. *Id.*

148. Robert Pear, *Big Increase Seen in People Lacking Health Insurance*, N.Y. TIMES, Sept. 30, 2003, at A1.

149. *Id.*

150. Tony Pugh, *43 Million Lack Insurance*, MIAMI HERALD, Sept. 30, 2003, at 3A.

151. *Id.*

hiking co-payments and deductibles as well.<sup>152</sup> Legislative efforts to expand coverage to the uninsured through the use of tax credits have languished in Congress.<sup>153</sup>

One side effect of the rising cost of benefits, like health insurance, is that salaries are stagnating at the slowest wage growth in decades, according to one expert.<sup>154</sup> The cost of prescription drugs is rising even faster than that of health insurance.<sup>155</sup> In light of this development several state governments are turning to Canada, lured by the prospect of slashing prescription drug costs in half.<sup>156</sup> Florida officials, however, insist it is wrong to import drugs from Canada.<sup>157</sup> The toll that soaring healthcare costs have exacted is seen in Florida's public sector in other ways. Legislators have required public employees to pay higher premiums for health insurance and for the first time ever, even Florida's elected officials may be forced to pay for their coverage.<sup>158</sup>

At age sixty-five, retirees become eligible for Medicare and the question arose whether an employer committed unlawful age discrimination by according such Medicare eligible retirees fewer health insurance benefits than those accorded non-Medicare eligible retirees.<sup>159</sup> In an effort to give guidance to employers caught in the middle of this issue, the EEOC issued a final rule on April 22, 2004 that allows employers to reduce or terminate health benefits once a retiree becomes eligible for Medicare, or similar state retiree health benefits, without committing unlawful age discrimination.<sup>160</sup> The new rule, critics claim, will fuel anxiety among the "[twelve] million Medicare beneficiaries who also receive health benefits from their former employers."<sup>161</sup>

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152. Robin Toner, *Boiling Brew: Politics and Health Insurance Gap*, N.Y. TIMES, Sept. 30, 2003, at A27.

153. *Id.*

154. Marilyn Geewax, *Experts: Don't Expect a Big Raise*, MIAMI HERALD, May 7, 2004, at 1C.

155. *Id.*; see also Theresa Agovino, *Four States Mull Buying Canadian*, MIAMI HERALD, Oct. 14, 2003, at 1C.

156. Agovino, *supra* note 155.

157. *Id.*

158. Gary Fineout, *Florida Elected Officials Could Lose Key Benefit*, MIAMI HERALD, Mar. 30, 2004, at 7B.

159. *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193, 196 (3d Cir. 2000).

160. Robert Pear, *Agency to Allow Insurance Cuts for the Retired*, N.Y. TIMES, Apr. 22, 2004, at A1.

161. *Id.*

#### D. *Family Medical Leave Act*

Under the Family and Medical Leave Act (FMLA),<sup>162</sup> all state and local government eligible 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.<sup>163</sup> In *Russell v. North Broward Hospital*,<sup>164</sup> the Eleventh Circuit upheld a Department of Labor regulation interpreting "serious health condition" to require more than three consecutive full days of incapacity, rather than three consecutive partial days.<sup>165</sup>

Those individually liable under the FMLA have been the subject of much debate. In determining whether supervisors or managers may bear individual liability under the FMLA, courts generally have concluded that the Act extends to all those who controlled, in whole or in part, the plaintiff's ability to take a leave of absence and return to her position.<sup>166</sup> When it comes to suing the federal government, however, the question of individual liability has divided the courts. The Sixth and Eleventh Circuit Courts, unlike the Eighth Circuit, have ruled that the FMLA bars individual liability suits against federal agency employers.<sup>167</sup>

State and local governments have looked to the FMLA in shaping and extending either paid leave or other forms of unpaid leave for employees. Starting July 1, 2004, for example, California became the first state to provide six weeks of paid leave for family and medical emergencies.<sup>168</sup> Under a 1999 Miami-Dade County law, companies with fifty or more employees must offer up to thirty days of unpaid leave for victims of domestic violence.<sup>169</sup> Increasingly, employers are setting up formal domestic-abuse policies, some with paid time off and legal counseling.<sup>170</sup>

Another emerging trend in the workplace that is aimed at strengthening families is the growing ranks of employers who provide some kind of adop-

162. 29 U.S.C. § 2601 (2000).

163. 29 U.S.C. § 2612 (2000).

164. 346 F.3d 1335 (11th Cir. 2003).

165. *Id.* at 1344.

166. *Waters v. Baldwin County*, 936 F. Supp. 860, 863 (S.D. Ala. 1996) (explaining that supervisors may be counted as employers if they exercised some control over employee's efforts to take FMLA leave).

167. *See, e.g., Mitchell v. Chapman*, 343 F.3d 811, 829 (6th Cir. 2003).

168. THEODORA LEE, *EMPLOYMENT LAW UPDATE 2003-2004*, at 113, 161 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. 774 2004).

169. D. E. Le' Ger, *A Helping Hand, Unclenched*, MIAMI HERALD, Oct. 2, 2003, at 3C.

170. *Id.*

tion benefit to their employees.<sup>171</sup> On average, some employers give between “\$1,500 to \$10,000 in financial assistance and from one week to [twelve] weeks of paid time off.”<sup>172</sup> While some employers maintain workplace policies that discourage employees from bringing their children to work on school holidays, others employers have “no problem with . . . employees taking their children to work on school holidays or when they’re sick.”<sup>173</sup>

### E. *Drug Testing*

The United States Supreme Court has made it clear that routine periodic drug testing of federal employees may be conducted without individualized suspicion or even absent suspicion of a drug problem whatsoever.<sup>174</sup> Because urine testing may require direct observation of urination to guarantee the reliability of the results, the federal government has cast about for less privacy-invasive means of drug testing of its employees. In April 2004, the federal government proposed testing the hair, saliva, and sweat of its 1.6 million employees in an effort to avoid the privacy issues surrounding urinalysis.<sup>175</sup> The new techniques will make it harder for workers to adequately prepare for, or to avoid, detection—even though since 1986 the positive rate for federal employees has declined to under one half percent from eighteen percent.<sup>176</sup>

### F. *Computer Privacy*

Many states have enacted so-called “Open Meetings Acts” which require that the public business be conducted in the open and not behind closed doors. At the same time, these statutes carve out classes of information, such as personal materials from public disclosure to protect the privacy rights of public employees . . . .<sup>177</sup>

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171. Cindy Krischer Goodman, *More Firms Offering Adoption Help to Employees*, MIAMI HERALD, Nov. 19, 2003, at 1C.

172. *Id.*

173. Cindy Krischer Goodman, *More Dads Taking Kids to Work, Raising Familiar Gender-Gap Issue*, MIAMI HERALD, Feb. 11, 2004, at 1C.

174. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989).

175. Leigh Strope, *Feds Propose New Drug Tests*, MIAMI HERALD, Apr. 7, 2004, at 3A.

176. *Id.*

177. JOHN E. SANCHEZ & ROBERT D. KLAUSNER, *STATE & LOCAL GOVERNMENT EMPLOYMENT LIABILITY, LIABILITY PREVENTION SERIES*, § 6:15, at 6-39 (Thompson-West 2003).

Employee e-mail has raised its own set of privacy concerns.<sup>178</sup> The Supreme Court of Florida ruled in 2003 that public employees' personal e-mails contained on government computers are not "public records" which must be disclosed under the state's public records law.<sup>179</sup> By contrast, 541 e-mail messages between West Virginia Governor Bob Wise and a state employee, "with whom he may have been romantically involved," have been released to the public under the Freedom of Information Act.<sup>180</sup>

### G. *Workers' Compensation*

Florida's Workers' Compensation statute grants employees suffering from work-related injuries or illness medical and hospital benefits.<sup>181</sup> The employer bears the burden of providing that any challenged medical treatment is unreasonable or unnecessary.<sup>182</sup> In many "soft-tissue" workers' compensation cases, employers can be hard pressed to challenge the extent of an injury.<sup>183</sup> Emerging medical technology, however, may be able to prove whether workers are faking neck, back, and carpal tunnel injuries.<sup>184</sup> With workers' compensation insurance rates soaring, employers search for anything "that will allow them to keep costs down."<sup>185</sup> A test offering objective medical diagnostics would likely prompt employers to contest claims that presently go un-investigated.<sup>186</sup>

Employees injured while commuting to work are ordinarily denied workers' compensation under the so-called "going-and-coming" rule.<sup>187</sup> The theory behind the rule is that the causal link between work and the injury is too attenuated and that hazards faced by commuters are merely the perils of ordinary life.<sup>188</sup> Injuries sustained in the course of meal breaks or the running of personal errands during the workday pose similar questions.<sup>189</sup> Under a bill approved by the Florida State Senate, all state law enforcement

178. *Id.* at 6–40.

179. *Florida v. City of Clearwater*, 863 So. 2d 149, 155 (Fla. 2003).

180. Bettijane Levine, *FYI: Yr E-mail Can Haunt U 4ever; A Word to the Unwary: Private Missives Don't Belong on the Internet*, L.A. TIMES, June 6, 2003, at E1.

181. FLA. STAT. § 440.09(1) (2003).

182. *Id.*

183. *See id.*

184. John Dorschner, *Machine May Stop Job-Injury Fakes*, MIAMI HERALD, Sept. 17, 2003, at 1C.

185. *Id.*

186. *See id.*

187. *Voehl v. Indem. Ins. Co. of N. Am.*, 288 U.S. 162, 169 (1933); *Longo v. Associated Limo*, 943 So. 2d 871, 944 (Fla. 1st Dist. Ct. App. 2004).

188. *See Voehl*, 288 U.S. at 169.

189. *Id.*

officers will be covered by workers' compensation and vehicle insurance "while traveling 'to and from lunch or meal breaks' or on 'personal errands' that are 'not substantial deviations from official state business.'"<sup>190</sup> Local law enforcement officers, however, are excluded from the bill.<sup>191</sup>

Workers' compensation benefits are sometimes reduced when the injured worker becomes eligible for social security.<sup>192</sup> For example, Florida law requires workers who were permanently and totally disabled before age sixty-two to have their state cost-of-living supplements to their workers' compensation benefits terminated after reaching age sixty-five.<sup>193</sup> A challenge to this law on federal preemption grounds was unsuccessful.<sup>194</sup>

#### H. *Unemployment Compensation*

On May 11, 2004, the United States Senate rejected by a single vote a bill that would have funded thirteen weeks of federal benefits for those unemployed who have exhausted their state aid.<sup>195</sup>

#### I. *Occupational Health and Safety Issues*

According to the Bureau of Labor Statistics, 5524 employees died in the workplace in 2002, down from 5915 in 2001.<sup>196</sup> Workplace homicides declined to 609 in 2002.<sup>197</sup> Hispanic employees died at a higher rate than black or white workers.<sup>198</sup> According to a study conducted by the Centers for Disease Control and Prevention, driving fatalities increased with age; and time, pressure, fatigue, and unfamiliar travel enhanced the risk.<sup>199</sup> Some workplace deaths stem from employers' failure to remedy safety violations.<sup>200</sup>

190. Marc Caputo, *New Push to Give Cops a Break on Insurance*, MIAMI HERALD, Apr. 22, 2004, at 7B.

191. *Id.*

192. *See* Harrell v. Fla. Constr. Specialists, 834 So. 2d 352, 355–56 (Fla. 1st Dist. Ct. App. 2003).

193. *Id.* at 354 n.1.

194. *Id.* at 354.

195. Mary Dalrymple, *Jobless Benefits Won't Be Extended*, MIAMI HERALD, May 12, 2004, at 3C.

196. *Fewer Dying on the Job*, MIAMI HERALD, Sept. 18, 2003, at 1C.

197. *Id.*

198. *Id.*

199. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, PUB. 2003-119, WORK-RELATED ROADWAY CRASHES—CHALLENGES AND OPPORTUNITY FOR PREVENTION (Sept. 2003), available at <http://www.cdc.gov/niosh/docs/2003-119/2003-119b.html> (last visited Oct. 30, 2004).

200. *Id.*

United States Senate democrats pledged to support legislation in 2004 that would raise the maximum prison sentence for willful safety violations that cause death in the workplace.<sup>201</sup> Stress in the workplace leading to premature deaths in the United States is blamed in part on a volatile labor market and on strained personal finances.<sup>202</sup>

Presenteeism, according to a recent study, can cost more than absenteeism when workers go to work sick.<sup>203</sup> Apart from getting co-workers sick, sick employees cost their employers about \$255 each per year in lost productivity.<sup>204</sup>

## J. *Miscellaneous Workplace Issues*

### 1. Meal Breaks

In Florida, under Broward Sheriff's Office rules, an entire day shift of police officers cannot take a coffee break together in an adjoining city, leaving the workplace city without a patrol presence.<sup>205</sup> The disclosure of such a violation gave substance to charges by critics that the merger of several cities' police departments with the Broward Sheriff's Office would mean that police protection would suffer.<sup>206</sup> Among other exacting rules, deputies' meal breaks are limited to thirty minutes and they cannot be taken during the first or last hour of their shifts.<sup>207</sup>

### 2. Take-Home Cars

According to a study by the Miami Herald, over one thousand Miami employees get a free car to drive home, but only seventeen percent have homes within the city; this policy is costing taxpayers millions of dollars.<sup>208</sup> Defenders of the policy argue that parked fire and police department cars

201. David Barstow, *Strong Criminal Penalties Sought for Violations That Kill Workers*, N.Y. TIMES, Apr. 28, 2004, at A15.

202. *Working Too Hard May Lead to Early Grave, Writer Says*, MIAMI HERALD, May 10, 2004, at 2GB.

203. William Kates, *Costly Sniffles; If You Go to Work Sick, You Could Hurt Your Boss—Big Time*, MIAMI HERALD, Apr. 23, 2004, at 1C.

204. *Id.*

205. Wanda J. DeMarzo, *BSO Bagel Break Broke the Rules*, MIAMI HERALD, Mar. 25, 2004, at 1A.

206. *Id.*

207. *Id.*

208. David Kidwell & Justin Willett, *Free Cars for Its Workers Cost Miami Millions*, MIAMI HERALD, Sept. 15, 2003, at 1A.

deter crime in residential neighborhoods.<sup>209</sup> In response to this study, Miami has been scaling back the number of take-home vehicles which in turn has angered the city's public employee unions who allege the city has breached its labor contract by reducing the city's fleet.<sup>210</sup>

### 3. Break on Traffic Tickets

For twenty-two years, Sheriff's deputies in Hillsborough County, Florida, have received a free pass on traffic tickets.<sup>211</sup> The deputies' traffic ticket immunity was successfully challenged by a driver who was injured by a deputy who ran a red light.<sup>212</sup>

## IV. DISCIPLINE, DISCHARGE, DISCRIMINATION, AND REMEDIES

### A. Constitutional Challenges

#### 1. First Amendment

To establish a First Amendment retaliation claim under section 1983, a public employee must prove: 1) her speech involves a matter of public concern; 2) her speech outweighs the government-employer's legitimate interest in running an efficient workplace; 3) the speech played a key role in the contested adverse employment action; and 4) the employer would not have reached the same employment decision absent the protected speech.<sup>213</sup>

In *Quinn v. Monroe County*,<sup>214</sup> the Monroe County Commissioners asked plaintiff as Library Director to study the feasibility of opening a library branch in Big Pine Key.<sup>215</sup> Plaintiff opposed the plan and told her supervisor so.<sup>216</sup> About a year later, plaintiff was discharged, allegedly for failure to cooperate, poor judgment, and ethical violations.<sup>217</sup> After an administrative hearing, plaintiff's dismissal was upheld.<sup>218</sup> Upon appeal, the Monroe County Circuit Court affirmed plaintiff's dismissal.<sup>219</sup> Next, plaintiff sued in

209. *Id.*

210. *Employees Can Keep 76 Take-Home Cars*, MIAMI HERALD, Jan. 20, 2004, at 3B.

211. *Traffic Tickets Are for Deputies Too*, MIAMI HERALD, Nov. 12, 2003, at 10B.

212. *Id.*

213. *Quinn v. Monroe County*, 330 F.3d 1320 (11th Cir. 2003).

214. *Id.* at 1329 n. 10.

215. *Id.* at 1322.

216. *Id.*

217. *Id.* at 1323.

218. *Quinn*, 330 F.3d at 1323.

219. *Id.*



federal court, contending for the first time that her dismissal was in retaliation for exercising her First Amendment right to contest the opening of the proposed library branch.<sup>220</sup> Losing again, plaintiff appealed to the Eleventh Circuit, which ruled that the person who fired plaintiff was not the final decision maker, a prerequisite for holding the county liable.<sup>221</sup> At the same time, the person who fired the plaintiff could be held individually liable on grounds that they were the official decision maker with respect to plaintiff's discharge.<sup>222</sup>

In *Travers v. Jones*,<sup>223</sup> a firefighter engaged in a verbal exchange with his boss while the firefighter and his co-workers were picketing outside the County's administrative office during their off-duty hours.<sup>224</sup> The plaintiff was suspended for thirty days for insubordination and unbecoming conduct.<sup>225</sup> The plaintiff alleged that he was disciplined in retaliation for engaging in protected union activity, a violation of his First Amendment<sup>226</sup> rights of free speech, freedom of association, and freedom of petition.<sup>227</sup>

While the Eleventh Circuit made clear that an employer may not discipline a public employee for engaging in protected speech, an employer need not "tolerate an embarrassing, vulgar, vituperative, ad hominem attack, simply because the employee was waving the [political] sign while conducting the attack."<sup>228</sup> Because a state administrative hearing officer resolved the disputed facts in favor of the employer, the Eleventh Circuit ruled that it must give the hearing officer's fact-finding preclusive effect.<sup>229</sup>

In *Silva v. Bieluch*,<sup>230</sup> deputy sheriffs campaigned in favor of the incumbent sheriff who lost the election to the defendant.<sup>231</sup> The deputies "appeared in campaign advertisements, attended political rallies, and . . . in 'get out the vote'" activities.<sup>232</sup> Upon taking office, the new sheriff transferred the plaintiffs from their probationary lieutenantcies back to their former posts.<sup>233</sup> After the federal district court dismissed plaintiff's complaint, they appealed.<sup>234</sup>

220. *Id.* at 1324.

221. *Id.* at 1326.

222. *Id.*

223. 323 F.3d 1294 (11th Cir. 2003).

224. *Id.* at 1295.

225. *Id.*

226. U.S. CONST. amend I.

227. *Travers*, 323 F.3d at 1295.

228. *Id.* at 1296 (quoting *Morris v. Crow*, 117 F.3d 449, 458 (11th Cir. 1997)).

229. *Id.* at 1297.

230. 351 F.3d 1045 (11th Cir. 2003).

231. *Id.* at 1046.

232. *Id.* at 1046-47.

233. *Id.* at 1046.

234. *Id.*

The Eleventh Circuit ruled against the plaintiffs' First Amendment claim, concluding that their political conduct did not constitute speech sufficient to trigger the traditional "Pickering" balancing test commonly enlisted to weigh public employees' free speech rights.<sup>235</sup> In effect, plaintiffs had not spoken out on issues of public concern.<sup>236</sup> While not addressing freedom of association, the court indirectly discussed this issue by concluding that a sheriff may promote, or demote, deputies on the basis of political patronage without offending the First Amendment.<sup>237</sup>

## 2. Due Process

The deputy sheriffs in *Silva v. Bieluch* also alleged violation of due process.<sup>238</sup> Rejecting their substantive due process claim stemming from their loss of rank, the Eleventh Circuit, citing circuit precedent concluded: "[b]ecause employment rights are state-created rights and are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection."<sup>239</sup> Turning to plaintiffs' procedural due process claims based on their alleged property and liberty interests, the Circuit Court rejected these claims as well.<sup>240</sup> As probationary employees, the court made clear that the plaintiffs had no property interest in their rank as lieutenants.<sup>241</sup> As for the alleged deprivation of their liberty interest, the court applied the so-called "stigma-plus" test.<sup>242</sup> Under this test, plaintiffs must prove defamation in addition to the infringement of some more tangible interest.<sup>243</sup> Given that plaintiffs kept their jobs, the court concluded that no liberty interest was implicated.<sup>244</sup> A mere transfer back to their former rank evinced no "additional loss of a tangible interest."<sup>245</sup>

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235. *Silva*, 351 F.3d at 1046–47.

236. *Id.* at 1047.

237. *Id.*

238. *Id.* at 1047–48.

239. *Id.* at 1047 (quoting *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994)).

240. *See Silva*, 351 F.3d at 1047–48.

241. *Id.* at 1048.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Silva*, 351 F.3d at 1048.

## B. *Employment Discrimination*

### 1. Generally

In general, public employees may look to the Equal Protection Clause in the Fourteenth Amendment<sup>246</sup> and to Title VII of the Civil Rights Act of 1964<sup>247</sup> for protection against discrimination in the workplace on grounds of race, sex, and national origin. While Title VII also protects against religious bias, under the United States Constitution such claims are nearly always assessed under the First Amendment.

During the past year the federal government has issued rules governing the collection of data useful in assessing compliance with anti-discrimination laws.<sup>248</sup> On December 29, 2003, the Commerce Department's Census Bureau released data on the sex, race, and ethnicity of U.S. employees, which can be enlisted by employers in tracking progress toward a bias-free workplace.<sup>249</sup>

The Labor Department's Office of Federal Contract Compliance Programs (OFCCP) requires federal contractors to maintain gender, race, and ethnicity data on applicants and employees. On March 29, 2004, the OFCCP issued a proposed rule requiring contractors to collect gender, race, and ethnicity information from internet job applicants as well.<sup>250</sup>

On June 11, 2003, the EEOC proposed revisions to its key employer reporting form, EEO-1, to increase the number of race and ethnic categories of individuals, including the number of job categories.<sup>251</sup>

### 2. Race: Section 1981

Section 1981 of the United States Code,<sup>252</sup> enacted by Congress in the wake of the Civil War to police the Thirteenth Amendment,<sup>253</sup> supports only

246. U.S. CONST. amend. XIV, § 1.

247. 42 U.S.C. § 2000e (2003).

248. See 57 AM. JUR. 3D *Proof of Facts* § 75 (2004).

249. See U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL EQUAL EMPLOYMENT OPPORTUNITY (EEO) TABULATION, available at <http://www.census.gov/hhes/www/eeoindex.html> (last revised Jul. 8, 2004).

250. Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes, 69 Fed. Reg. 16,446, 16,477 (March 29, 2004) (to be codified at 41 C.F.R. pt. 60-1).

251. Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) Comment Request, 68 Fed. Reg. 34,965, 34,967 (June 11, 2003).

252. 42 U.S.C. § 1981 (2000).

253. U.S. CONST. amend. XIII.

claims alleging racial discrimination.<sup>254</sup> In 1991, Congress amended section 1981 by adding 42 U.S.C. § 1981(c), which makes clear that “[t]he rights protected by this section are protected against impairment by nongovernmental discrimination.”<sup>255</sup> There is a circuit court split over whether section 1981(c) opened up an implied private right of action against municipalities.<sup>256</sup> Until recently, there was also a circuit court split over whether section 1981 claims are governed by different statutes of limitations depending upon whether they allege pre-formation or post-formation bias claims. But on May 3, 2004, in *Jones v. R.R. Donnelley & Sons Co.*,<sup>257</sup> the Supreme Court resolved this circuit court split by ruling that federal causes of action created after 1990 are governed by a four-year statute of limitations if Congress has not spelled out a specific limitation period for them.<sup>258</sup>

### 3. Same-Sex Bias

While Title VII offers no direct protection against discrimination in the workplace on grounds of sexual orientation, gay and lesbian public employees receive some measure of protection under the Equal Protection Clause of the Fourteenth Amendment<sup>259</sup> and under an array of state and local laws. In 2003, 13 states, 119 cities, and 23 counties banned sexual orientation discrimination in the workplace.<sup>260</sup> On July 1, 2003, Wal-Mart Stores, Inc. became the largest private employer to ban sexual orientation discrimination in employment.<sup>261</sup> At the federal level, Senate Minority Leader Tom Daschle, a South Dakota Democrat, introduced a Senate bill in 2003 to ban sexual orientation bias in the workplace.<sup>262</sup> A House bill offered by Representative Edolphus Towns, a New York Democrat, would do the same.<sup>263</sup>

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254. See § 1981.

255. § 1981(c).

256. See, e.g., *Watkins v. Penn. Bd. of Prob. and Parole*, No. 02-CV-2881, 2002 WL 321182088, at \*4 (E.D. Penn. Nov. 25, 2002); *Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1210 (9th Cir. 1996).

257. 124 S. Ct. 1836 (2004).

258. *Id.* at 1845.

259. See U.S. CONST. amend. XIV, § 1.

260. *Wal-Mart Stores Expand Job Policies to Include Protection for Gay Workers*, 72 U.S.L.W. No. 2, at 2017, 2027 (2004).

261. *Id.*

262. S. 16, 108th Cong. (2003).

263. See H.R. 214, 108th Cong. (2003).

#### 4. Gender

##### a. Title VII

At times, the law treats some employees who quit as though they were dismissed. This judicial doctrine is known as constructive discharge.<sup>264</sup> To prevail on such a claim, the former employee must establish that a reasonable person, faced with similar unfair employment conditions, would leave rather than continue to suffer such conditions.<sup>265</sup> While the United States Supreme Court has acknowledged the doctrine in other labor contexts,<sup>266</sup> until 2004, it had not explicitly recognized it under Title VII.<sup>267</sup>

But on June 14, 2004, the United States Supreme Court ruled that employees who quit over “intolerable” sexual harassment may sue their employers as though they had been fired, even if they did not actually lodge a complaint.<sup>268</sup> Employers however, may avoid liability for damages if they can persuade a jury that the employee unreasonably ignored the complaint procedure.<sup>269</sup> This ruling can fairly be read as applying not only to sexual harassment, but also to race, national origin, religion, age, and disability discrimination.

In 1998, to further strengthen the law governing sexual harassment in the workplace, the United States Supreme Court decided two cases dealing with employer liability for sexual harassment by supervisors under Title VII: *Faragher v. City of Boca Raton*<sup>270</sup> and *Burlington Industries Inc. v. Ellerth*.<sup>271</sup> These two rulings left room for employers to raise a successful defense by, for example, establishing that victims of sexual harassment had unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. In *Walton v. Johnson & Johnson Services Inc.*,<sup>272</sup> the Eleventh Circuit Court ruled that the employer was entitled to avail itself of this affirmative defense outlined in *Farragher* and *Ellerth*, given that the employer quickly removed the harassing supervisor.<sup>273</sup>

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264. See *Penn. State Police v. Suders*, 124 S. Ct. 2342, 2351 (2004) [hereinafter *Suders I*].

265. *Suders v. Easton*, 325 F.3d 432, 445 (3d. Cir. 2003).

266. See, e.g., *Speth v. Capitol Indem. Corp.*, 139 F.3d 902 (7th Cir. 1998) (holding that an employee was unable to establish prima facie case for constructive discharge).

267. *Suders I*, 124 S. Ct. at 2352.

268. See *id.* at 2357.

269. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

270. 524 U.S. 775 (1998).

271. 524 U.S. 742 (1998).

272. 347 F.3d 1272 (11th Cir. 2003).

273. *Id.* at 1293.

b. *Title IX*

Title IX of the Education Amendments of 1972,<sup>274</sup> 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.”<sup>275</sup> Title IX governs public employees to a limited extent.<sup>276</sup> Public school teachers, for example, may sue for sex discrimination under the Act.<sup>277</sup> The Supreme Court has made clear that damages are recoverable under Title IX only for intentional sex discrimination.<sup>278</sup> But under proposed federal legislation, namely the Civil Rights Act of 2004, disparate impact claims would also be cognizable under the Act.<sup>279</sup>

## 5. Age

The 1967 Age Discrimination in Employment Act (ADEA) prohibits age discrimination of any worker age forty or older.<sup>280</sup> In *General Dynamics Land Systems, Inc. v. Cline*,<sup>281</sup> two hundred employees alleged they suffered reverse age discrimination because they were too young to qualify for benefits offered to co-workers age fifty and over.<sup>282</sup> On February 24, 2004, the United States Supreme Court ruled, six to three, that an employer does not violate the ADEA rights of employees in their forties by favoring an older employee over a younger one.<sup>283</sup> In rejecting the plaintiffs’ reverse discrimination claim, Justice Souter, who wrote for the majority, pointed out that “[t]he enemy of 40 is 30, not 50.”<sup>284</sup> Advocacy groups for people over fifty nailed the decision, giving older workers preferential treatment.<sup>285</sup>

The circuit courts of appeal are split five-to-three over whether disparate impact claims may lie under the ADEA.<sup>286</sup> Unlike disparate treatment, disparate impact does not include the intent to discriminate, and the em-

274. 20 U.S.C. § 1681 (2000).

275. § 1681(a).

276. *See id.*

277. *See, e.g.,* Chance v. Rice Univ., 984 F.2d 151, 152 (5th Cir. 1993).

278. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992).

279. *See* H.R. 3809, 108th Cong. § 603 (2004); S. 2088, 108th Cong. § 603 (2004).

280. 29 U.S.C. § 631(a) (2000).

281. 124 S. Ct. 1236 (2004).

282. *Id.* at 1239.

283. *Id.* at 1248–49.

284. *Id.* at 1243.

285. Gina Holland, *Younger Workers Lose Age-Discrimination Case*, MIAMI HERALD, Feb. 25, 2004, at 3C.

286. *See, e.g.,* *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 187 (5th Cir. 2003).

ployer's burden is heavier.<sup>287</sup> For these reasons, this framework has influenced various appeals for many aggrieved employees. Proposed legislation, namely the Civil Rights Act of 2004, would make clear that disparate impact claims are cognizable under the ADEA.<sup>288</sup> Moreover, on March 29, 2004, the Supreme Court agreed to hear a case involving older police officers in Jackson, Mississippi that will decide the issue under the ADEA as it is currently written.<sup>289</sup> In *Smith v. City of Jackson, Mississippi*,<sup>290</sup> older officers claimed that new wage rates had the effect of giving proportionately smaller increases to the older officers.<sup>291</sup> Both lower federal courts in the case ruled that only disparate treatment cases may be brought under the ADEA.<sup>292</sup> In 2002, the United States Supreme Court sidestepped the issue in a case brought by older workers against the Florida Power Corporation.<sup>293</sup> EEOC regulations recognize the disparate impact framework under the ADEA.<sup>294</sup>

Currently, ADEA suits must be filed within ninety days of receipt of a right to sue notice from the EEOC.<sup>295</sup> However, on December 17, 2003, the EEOC published a final rule clarifying that charging parties under the ADEA need not wait for the EEOC's notice of dismissal of the charge before pursuing a private civil suit.<sup>296</sup>

## 6. Disability

The Americans With Disabilities Act (ADA) prohibits discrimination against applicants and employees who suffer either from mental or physical impairment, not only at the hiring and dismissal stages, but also regarding virtually every other term and condition of employment.<sup>297</sup> Despite the scope of this protection, according to a survey by the American Bar Association in

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287. *Ass'n for Disabled Americans v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1361 (S.D. Fla. 2001).

288. *See* H.R. 3809, 108th Cong. § 603 (2004); S. 2088, 108th Cong. § 603 (2004).

289. Linda Greenhouse, *Supreme Court to Consider Role of Intent in Age Bias*, N.Y. TIMES, Mar. 30, 2004, at A16.

290. 351 F.3d 183 (5th Cir. 2003).

291. *Id.* at 185.

292. *Id.*

293. *Id.* at 187.

294. *Id.* at 200.

295. 29 U.S.C. § 626(e) (2000).

296. Procedures—Age Discrimination in Employment Act, 68 Fed. Reg. 70,150 (Dec. 17, 2003) (to be codified at 29 C.F.R. pt. 1626).

297. *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1084 (10th Cir. 1997).

2002, employers won 94.5 percent of federal court decisions rendered under Title I of the ADA, which pertains to employment.<sup>298</sup>

In 2001, the United States Supreme Court ruled, in *Board of Trustees of the University of Alabama v. Garrett*,<sup>299</sup> that state employees may not sue their employers for damages in federal court for violations of Title I of the ADA.<sup>300</sup> Another source of state and local government liability for public employee claims of disability discrimination is found in section 503 of the Rehabilitation Act,<sup>301</sup> which covers contracts between the federal government, and state and local governments.<sup>302</sup> The Eleventh Circuit Court of Appeals has ruled that the receipt of federal funds by a state agency is a waiver of that agency's Eleventh Amendment immunity from suit under the Rehabilitation Act.<sup>303</sup>

Under the ADA, "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs."<sup>304</sup> On December 2, 2003, in *Raytheon Co. v. Hernandez*,<sup>305</sup> the United States Supreme Court addressed a disparate treatment claim by a former employee who was terminated after testing positive for drugs.<sup>306</sup> The Court ruled that it was improper to apply disparate impact analysis to conclude that the employer's neutral no-hire policy had a discriminatory impact on rehiring rehabilitated drug addicts.<sup>307</sup> Instead, the Court made clear the proper framework for judging whether the employer's policy violated the ADA, which was whether it amounted to a legitimate, nondiscriminatory reason sufficient to defeat the employee's prima facie case of discrimination.<sup>308</sup> This narrow ruling does not decide the larger issue of whether former drug addicts and alcoholics are entitled to equal treatment when they seek employment elsewhere.<sup>309</sup>

The ADA outlaws retaliation against employees who file a charge, testify, assist, or play any role in investigations, proceedings, or hearings under

298. Amy L. Allbright, *2003 Employment Decisions Under the ADA Title I—Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 320 (2004).

299. 531 U.S. 356 (2001).

300. *Id.* at 374.

301. 29 U.S.C. § 793 (2000).

302. *Id.*

303. *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 193 F.3d 1214, 1218 (11th Cir. 1999).

304. 42 U.S.C. § 12210(a) (2004).

305. 540 U.S. 44 (2003).

306. *Id.* at 516.

307. *Id.* at 520.

308. *Id.* at 521.

309. David G. Savage, *High Court Upholds Firm's Rehiring Ban*, L.A. TIMES, Dec. 3, 2003, at A22.



the ADA.<sup>310</sup> The term “retaliation” includes any interference, coercion, or intimidation of employees exercising their ADA rights.<sup>311</sup> But the plaintiff must prove that she sustained an adverse employment action in order to prevail on her retaliation claim. In *Mays v. City of Tampa*,<sup>312</sup> the Eleventh Circuit ruled that neither critical performance reviews by a supervisor, nor added work load to compensate for an employee’s pregnancy and hearing loss, amounted to an adverse employment action required to make out a prima facie case of retaliation under the ADA.<sup>313</sup>

Under the ADA, the employer owes the duty of reasonable accommodation to the physical or mental impairments of an otherwise qualified individual.<sup>314</sup> In an informal guidance letter, the EEOC has clarified that employers are not required “to collect and safely dispose of used needles and syringes as a reasonable accommodation for employees who must use them to treat medical conditions, such as diabetes.”<sup>315</sup> In *Wood v. Green*,<sup>316</sup> the Eleventh Circuit ruled that an employer need not reasonably accommodate an employee’s request for indefinite leave to treat his headaches so that he could work at some uncertain point in the future.<sup>317</sup> And at Miami International Airport, a security screener alleged that his employer wrongfully refused to reasonably accommodate his disability, poor night vision, by forcing him to ride his bicycle to work at three o’clock in the morning.<sup>318</sup>

## 7. Religion

Under Title VII, it is unlawful for an employer to refuse to hire, dismiss, or otherwise discriminate against anyone with respect to her wages, terms, or conditions of employment owing to such person’s religion.<sup>319</sup> In 2003, nearly six hundred Muslims filed employment discrimination claims involving their faith, about double the number of cases arising in 2000.<sup>320</sup> Most

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310. 42 U.S.C. § 12203(a) (2000).

311. § 12203(b).

312. No. 02-16556, 2003 WL 21283511, at \*1 (11th Cir. May 23, 2003).

313. *Id.*

314. 42 U.S.C. § 12111(8) (2000).

315. *Employer Not Required to Dispose of Syringes for Employees Treating Medical Conditions*, 72 U.S.L.W. 2665, 2674 (2004).

316. 323 F.3d 1309 (11th Cir. 2003).

317. *Id.* at 1314.

318. Joan Fleischman, *Airport Screener is Suing Over Bike Rides*, MIAMI HERALD, May 12, 2004, at 1B.

319. 42 U.S.C. § 2000e-2(a)(1).

320. Mary Beth Sheridan, *Bias Against Muslims Surges, Group Reports*, MIAMI HERALD, May 4, 2004, at 9A.

cases involved an employer's refusal to accommodate Muslims' religious practices.<sup>321</sup>

Two Eleventh Circuit Court of Appeals cases involving religion in the workplace were decided in 2003.<sup>322</sup> In *Rossi v. Troy State University*,<sup>323</sup> a public university professor's hostile work environment claim failed because the plaintiff was unable to prove that repeated religion based harassment was sufficiently hostile to alter the terms and conditions of his employment.<sup>324</sup> In *Eljack v. Security Engineers Inc.*,<sup>325</sup> the Court addressed a perennial question raised by some employees sporting facial hair out of religious conviction: whether an employer violates a worker's religious rights by forcing him to shave his beard?<sup>326</sup> The answer often turns on the business justification for such a policy.

### C. Remedies

There is a growing form of mandatory arbitration negotiated between individual employees and their employers governed by the Federal Arbitration Act.<sup>327</sup> This type of arbitration may be binding on the parties, foreclosing any recourse to courts other than to appeal the decision of an arbitrator, which is rarely overturned.<sup>328</sup> However, under proposed legislation, the Civil Rights Act of 2004,<sup>329</sup> the Federal Arbitration Act would be amended to exclude employment contracts and would bar employers from forcing employees to sign mandatory arbitration agreements waiving their right to sue in court.<sup>330</sup> If enacted, the measure would overturn a United States Supreme Court decision, *Circuit City Stores Inc. v. Adams*,<sup>331</sup> interpreting the Federal Arbitration Act as encompassing most employment contracts, except for those involving transportation employees.<sup>332</sup>

321. *Id.*

322. See *Rossi v. Troy State Univ.*, No. 02-15455, 2003 WL 21283627, at \*1 (11th Cir. May 30, 2003); *Eljack v. Sec. Eng'rs, Inc.*, 2003 U.S. App. LEXIS 22183, at \*1 (11th Cir. May 30, 2003), *reh'g denied*, 124 S. Ct. 2091 (2004).

323. No. CIV.A.01-A-1319-N, 2002 WL 32627779, at \*1 (M.D. Ala. July 22, 2002), *rev'd en banc*, No. 02-15455, 2003 WL 21283627, at \*1 (11th Cir. May 30, 2003).

324. *Id.* at \*3-4.

325. Appellees' Brief at \*3, *Eljack v. Sec. Eng'rs, Inc.*, No. 02-15852-AA, 2002 WL 32182374 (11th Cir. Dec. 23, 2002).

326. *Id.*

327. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

328. *Id.*

329. H.R. 3809, 108th Cong. § 603 (2004); S. 2088, 108th Cong. § 603 (2004).

330. *Id.*

331. 532 U.S. 105 (2001).

332. H.R. 3809 § 603; S. 2088 § 603.

The proposed Civil Rights Act of 2004 would substantially alter current labor and employment law in other ways as well.<sup>333</sup> For example, under the bill, undocumented workers would be entitled to recover back pay if they are victims of employment discrimination.<sup>334</sup> Moreover, the Act would also lift the cap on Title VII damage awards.<sup>335</sup>

Finally, many courts have attempted to constrain efforts by employers to tip the scales in their favor by slipping in one-sided provisions in arbitration agreements. The Eleventh Circuit faced such an issue in *Summers v. Dillard's, Inc.*,<sup>336</sup> where language in an arbitration agreement, drafted by the employer, afforded relief for attorneys' fees only.<sup>337</sup> Thus, the employee initially prevailed at arbitration.<sup>338</sup> Despite this exacting standard, the Court refused to deem the provision unconscionable, thus leaving the employee bound by his promise to arbitrate all sex and age discrimination claims.<sup>339</sup>

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333. *Id.*

334. H.R. 3809 § 702.

335. H.R. 3809 § 112.

336. 351 F.3d 1100 (11th Cir. 2003).

337. *Id.* at 1101.

338. *Id.*

339. *Id.*