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2003 Survey of Florida Public Employment Law

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2003 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

JOHN SANCHEZ*

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I. INTRODUCTION

This survey article limns the several stages of public employment in Florida during 2002-2003, beginning with the law governing the hiring of not only employees, but also of public officials. For example, Florida's efforts to regulate political advertising by public officials in the face of First Amendment challenges are explored in Part II. The growing trend toward privatizing public jobs is also touched on in this section.

Part III surveys the law governing the terms of public employment. Under the heading of hours and wages, this section explores recent developments in the Fair Labor Standards Act involving overtime regulations. Moreover, this section touches on the growing trend among Florida cities and counties to adopt so-called living wage statutes that peg salaries to the cost of living. As for employment benefits law, Part III surveys recent developments involving the Family Medical Leave Act, disability and death benefits, public pensions, health benefits, unemployment compensation, and occupational health and safety issues.

Part IV addresses recent legal developments governing the discipline and discharge of public employees. For example, some public employees have been terminated in retaliation for engaging in protected activity, for blowing the whistle on illegal conduct committed by their employers, or for speaking out critically on matters touching on their employment. Turning to recent case law and legislative action involving employment discrimination, Part IV covers discriminatory practices involving race, national origin, gender, age, disability, same-sex bias, and religion. Finally, Part IV looks at recent developments concerning remedies for employment discrimination such as reinstatement, back pay, and the availability of attorneys' fees for prevailing parties.

Part V covers legal issues involving collective bargaining in the public sector. In addition, recent developments concerning public unions and grievance arbitration are touched upon.

II. HIRING, POLITICAL ADVERTISING, AND EXAMINATIONS

A. *Public Officials' Political Ads*

Public officials are either appointed or elected and serve in the position for a prescribed term or at the pleasure of a higher official. Officials campaigning for public office must heed state laws governing political advertising. For example, Florida law stipulates that ads supporting a particular candidate must disclose if it is a paid political advertisement.¹ “[V]iolation is a misdemeanor punishable by up to \$1,000 or a year in jail.”² In January 2003, a Fort Lauderdale mayoral candidate was accused of violating this law.³ At the same time states must be wary of trading on political candidates’ First Amendment rights when regulating political advertising.

B. *Privatization*

Privatization, whereby formerly governmental services are undertaken by private enterprise, continues to be a controversial issue as even essential governmental tasks such as prison administration are contracted out.⁴ Privatization in Florida has come under fire: “[p]oor-quality privatized services have caused children to be stranded when school buses didn’t run, disabled people to be stuck with no transportation, sick people to face nightmarish insurance service”⁵ Legal issues raised by privatization in 2002-2003 include the following:

1. Despite a United States Supreme Court ruling sustaining an Ohio school vouchers law, Florida courts are urged by the Florida Teachers’ Union to conclude that Florida’s voucher law violates the state constitution, which prohibits public money being funneled to promote religion.⁶

1. *Campaign Ad Apparently Violates State Law*, MIAMI HERALD, Jan. 31, 2003, at 7B.

2. *Id.*

3. *Id.*

4. See, e.g., Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 33 FED. B. NEWS & J. 194, 195 (1986).

5. James Fendrich, *Privatization Costs Floridians Millions of Dollars*, MIAMI HERALD, May 4, 2001, available at <http://www.commondreams.org/views01/0504-03.htm>.

6. *Does Voucher Law Violate State Constitution? Judge Hears Lawsuit*, MIAMI HERALD, July 10, 2002, at 8B.

2. In 2000, President Clinton signed an executive order deeming air traffic service “an inherently governmental function.”⁷ In 2002, President Bush deleted those four words.⁸ On June 12, 2003, the Senate voted to bar the government from privatizing air traffic control.⁹

3. On May 29, 2003, the Office of Management and Budget (“OMB”) published changes to Circular A-76, its guidelines governing the method federal agencies use in assessing whether a commercial activity should be undertaken by the public or private sector.¹⁰ By these revisions, OMB aims at opening 425,000 federal jobs to private sector competition.¹¹

4. Rep. Ralph Arza, R-Hialeah, who serves on the Florida House Education Appropriations Subcommittee, proposed eliminating the public school police force and contracting with city police departments to provide campus security.¹²

C. *Bus Driver’s Exam*

In November 2002, Miami-Dade County voters approved a half-penny sales tax in order to double the 1,500 municipal bus drivers force by 2006.¹³ The date set for the bus drivers’ exam, however, had unexpected consequences for public school students.¹⁴ So many school bus drivers took the exam for the better-paying jobs with Miami-Dade Transit Agency that school authorities struggled to provide school bus transportation after nearly one-quarter of the workforce called in sick.¹⁵

7. *Senate Bans Privatizing Air Traffic Control*, L.A. TIMES, June 13, 2003, at A21.

8. *Id.*

9. *Id.*

10. Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

11. Jason Peckenpaugh, *New Rules Should Make Competition Routine in Government*, SAYS OMB, GOV’T EXEC. MAG., May 29, 2003, available at <http://www.govexec.com/dailyfed/0503/052903p1.htm>.

12. Matthew I. Pinzur, *Dade is \$55 Million Short in Spending on Teachers*, MIAMI HERALD, Oct. 23, 2002, at 8B.

13. David Ovalle, *Schools Hustle as Bus Drivers Miss Work*, MIAMI HERALD, Jan. 25, 2003, at B.

14. *Id.*

15. *Id.*

III. TERMS OF EMPLOYMENT

A. *Hours and Wages*

1. Fair Labor Standards Act Issues

a. *Overtime*

The Fair Labor Standards Act (“FLSA”) governs minimum wage and overtime pay in both the public and private employment sectors.¹⁶ Section 213(a)(1) of the FLSA carves out a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity.¹⁷ For example, in *Hogan v. Allstate Insurance Company*, insurance claims adjusters satisfied the test for exemption from FLSA’s overtime rules as bona fide administrative employees.¹⁸

“Current law exempts workers from overtime pay if they earn more than \$155 a week, or \$8,060 a year.”¹⁹ For the first time in twenty-eight years, the Department of Labor (“DOL”) is proposing to update this salary test.²⁰ The proposal would raise the minimum weekly salaries employees can earn from \$155 to \$425, to count as “white collar” workers exempt from FLSA’s overtime rules.²¹ About twenty-two million Americans might be affected by the DOL’s new definition of white-collar workers.²² One clear line the proposal establishes is that all employees earning under \$22,100 a year must receive overtime pay.²³ Moreover, white-collar professionals would be exempt from overtime rules if they “manage more than two employees and have the authority to hire and fire, or if they have an advanced degree or similar training and work in a specialized field, or work in the operations, finance, and auditing areas of a company.”²⁴ While organized labor favors the proposal guaranteeing overtime status to all employees earning under \$22,100 a year, it worries that the broadened definition of employees

16. 29 C.F.R. § 1-4907 (2002).

17. 29 C.F.R. § 541.1 (2002); 29 U.S.C. § 213(A)(1) (2000).

18. 210 F. Supp. 2d 1312, 1324 (M.D. Fla. 2002); *see also*, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 C.F.R. § 541(2002).

19. Leigh Strobe, *Millions May Lose or Gain Overtime Pay*, MIAMI HERALD, Mar. 28, 2003, at C.

20. *Id.*

21. 29 C.F.R. § 541.

22. Strobe, *supra* note 19.

23. *Id.*

24. *Id.*

“exempt from overtime pay to include any employee in a ‘position of responsibility’” covers too many workers.²⁵ As it is, many employers already find many ways to get workers to put in extra hours without any compensation, much less overtime as mandated by the FLSA.²⁶

On July 10, 2003, the House of Representatives barely sustained proposed labor regulations that might disqualify eight million employees from overtime pay.²⁷ The 213–210 vote blocked a Democratic bill that would have prevented the Labor Department from implementing the new rules on overtime.²⁸

Overtime pay for Florida public employees came into play in *Debrecht v. Osceola County*.²⁹ Battalion chiefs for an emergency services department sued Osceola County under the FLSA seeking damages for unpaid overtime compensation but lost.³⁰ The federal district court concluded that the plaintiffs were exempt from the FLSA overtime provisions, given that they were compensated on a salary basis and fell within the statutory definition of administrative, as well as executive, employees.³¹

b. *Miscellaneous Wage and Hour Issues*

Under the FLSA, a group of employees are entitled to sue to recover wages even though such a suit is not literally a class action as defined in rule 23 of the *Federal Rules of Civil Procedure*.³² The difference is that an employee must “opt-in” to become a member of a FLSA class while a member of the *Federal Rule of Civil Procedure* 23 class must seek exclusion to avoid ending up a member.³³ On May 19, 2003, the Supreme Court handed down its only FLSA case in the term.³⁴ In *Breuer v. Jim’s Concrete of Brevard, Inc.*,³⁵ the Court ruled that the FLSA does not prohibit removal of suit from state to federal court.³⁶

25. Justin Gest, *Unions Decry Proposed OT Rule*, L.A. TIMES, July 1, 2003, at A17.

26. See, e.g., Edward Wasserman, *Working Overtime Without Compensation*, MIAMI HERALD, Jan. 13, 2003, at 9B.

27. Nick Anderson, *House Lets Bush Proceed With Overtime Revisions*, L.A. TIMES, July 11, 2003, at A17.

28. *Id.*

29. 243 F. Supp. 2d 1364 (M.D. Fla. 2003).

30. *Id.*

31. *Id.* at 1373.

32. 29 U.S.C. § 216(b) (2000). See generally FED. R. CIV. P. 23.

33. *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977); see FED. R. CIV. P. 23(c).

34. See *Breuer v. Jim’s Concrete of Brevard, Inc.*, 123 S. Ct. 1882 (2003).

35. *Id.*

36. *Id.* at 1884.

The circuit courts are split over whether the FLSA allows a district court to count overpayments made in some pay periods against underpayments in other pay periods.³⁷ In this regard, the Sixth and Seventh Circuits reject such offsets while the Eleventh Circuit permits them.³⁸

Finally, the Eleventh Circuit ruled in *Arriaga v. Florida Pacific Farms, L.L.C.*,³⁹ that two Florida farmers violated the FLSA's minimum wage rules by refusing to compensate Mexican farm workers during their first work-week for travel expenses from Mexico to Florida.⁴⁰

2. Living Wage

"Living wage laws require employers to pay employees enough to keep a family of four at or above the poverty line," which comes out to \$18,100 a year, or \$8.70 an hour.⁴¹ The living wage concept originated in Baltimore in 1994, and today over eighty cities and counties have embraced the doctrine.⁴²

In South Florida, Miami-Dade County was the first to adopt the so-called living wage law.⁴³ In October 2002, the Broward County Commission voted to pay county employees a living wage of \$9.57 an hour beginning in October 2003.⁴⁴ Following suit, a Miami City Commissioner urged the city to "pay all its employees a living wage in an effort to combat poverty."⁴⁵ The living wage in Miami is \$8.56 an hour if health benefits are provided, or \$9.81 if they are not.⁴⁶ To date, Miami-Dade, Broward, and Palm Beach Counties have adopted living wage laws.⁴⁷ Hollywood is the most recent South Florida city to contemplate paying all its workers a living wage.⁴⁸

37. *Singer v. City of Waco*, 324 F.3d 813, 827 (5th Cir. 2003); *see also* *Herman v. Fabricators of Am.*, 308 F.3d 580 (6th Cir. 2002); *Howard v. City of Springfield*, 274 F.3d 1141 (7th Cir. 2001); *Kolheim v. Glynn County*, 915 F.2d 1473 (11th Cir. 1990).

38. *E.g.*, *Singer*, 324 F.3d at 817 (noting circuit split on this FLSA issue).

39. 305 F.3d 1228 (11th Cir. 2002).

40. *Id.* at 1232.

41. Brad Bennett, *County Could Raise Minimum Pay Scale*, MIAMI HERALD, Oct. 7, 2002, at 1B.

42. *Id.*

43. *Id.*

44. *Official Calls for Miami to Pay a "Living Wage"*, MIAMI HERALD, Oct. 30, 2002, at 3B.

45. *Id.*

46. *Id.*

47. Brad Bennett, *County Workers to Get "Living Wage"*, MIAMI HERALD, Oct. 9, 2002, at 1A.

48. Jerry Berrios, *"Living Wage" Is Hot Topic for City*, MIAMI HERALD, Apr. 1, 2003, at 1B.

3. Wage Gap

Men, on average, make more money than women.⁴⁹ Part of this wage gap can be blamed on continuing gender discrimination, but part of it stems from non-discriminatory reasons such as the fact that many women leave the work force either temporarily or permanently to raise a family. While women have been closing this gap over time, little progress has been made in the last decade.⁵⁰ But in 2002-2003, the average female employee received a five percent raise in her weekly pay while men's weekly wages rose only 1.3% to \$692.⁵¹ Women are concentrated in the services sector and government employment, the two sectors least affected by the last two years of economic weakness.⁵² Men, by contrast, work in industries like manufacturing and technology that have suffered most in the last two years.⁵³ Full-time female employees made 77.5% of what full-time male employees did in 2002.⁵⁴

4. Teachers' Salaries

The Dollars to the Classroom Act, enacted by the Florida Legislature in 2001, requires school districts that flunk statewide academic standards to raise that part of their next budget to be spent on teachers and teacher training.⁵⁵ Despite the law, thirty school districts statewide have failed to comply.⁵⁶ For example, Miami-Dade County Public Schools spent fifty-five million dollars less on teachers in 2002 than the act mandated.⁵⁷ Arguably, a key reason so many districts feel free to flout state law is because the act imposes no punishment for failure to comply.⁵⁸

According to the Miami Herald, Broward public school teachers received an average pay increase of 5.5% in 2002, raising starting salaries from \$31,560 to \$32,600.⁵⁹ Despite statewide teacher pay raises, Florida remains

49. See David Leonhardt, *Women Outpace Men in Wage Gains*, TIMES UNION (Albany, N.Y.), Feb. 17, 2003, at A1.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Leonhardt, *supra* note 49.

55. Pinzur, *supra* note 12.

56. *Id.*

57. *Id.*

58. *Id.*

59. Steve Harrison, *Broward, Teachers Agree on Pay Hike*, MIAMI HERALD, Oct. 8, 2002, at 1B.

thirty-first in the nation in average teacher salaries.⁶⁰ In 2001, Broward had the third-highest starting teacher salary in the state, after Miami-Dade and Palm Beach Counties.⁶¹

B. *Benefits*

1. Family and Medical Leave Act

Under the Family Medical Leave Act (“FMLA”),⁶² public and private 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.⁶³

During years 2002-2003, the following FMLA issues have been addressed:

1. On May 27, 2003, the Supreme Court ruled 6–3 in *Nevada Department of Human Resources v. Hibbs*,⁶⁴ that states enjoy no Eleventh Amendment immunity from damages suits for violating their employees’ FMLA guaranteed right to take time off for family emergencies.⁶⁵

2. There is a circuit court split over whether an employer who refuses to reinstate a worker out on FMLA leave bears the burden of establishing that the worker would have been discharged even if he or she had not taken FMLA leave.⁶⁶ The Tenth Circuit, agreeing with the Eleventh Circuit and disagreeing with the Seventh Circuit, has concluded that the employer bears the burden.⁶⁷

3. On December 4, 2002, the DOL proposed to repeal regulations aimed at promoting state use of unemployment insurance to provide partial wage replacement for parents on FMLA leave to care for newborns or newly adopted children.⁶⁸

60. *Id.*

61. *Id.*

62. 29 U.S.C. § 2612 (2000).

63. § 2612(a)(1).

64. 123 S. Ct. 1972 (2003).

65. *See id.* at 1976.

66. *See, e.g., Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 963 (10th Cir. 2002).

67. *Id.*

68. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation: Removal of Regulations, 67 Fed. Reg. 72,122 (Dec. 4, 2002).

4. On February 5, 2003, Senator Christopher J. Dodd (D-Conn.), introduced a bill that would expand the FMLA to protect more employees and offer additional grounds for taking leave.⁶⁹

2. Disability and Death Benefits

In *In re Jones*,⁷⁰ a Washington State Patrol Trooper was first placed on temporary disability status and then on permanent disability status.⁷¹ In violation of the terms of his disability benefits, Jones received unlawful time loss payments without informing State Patrol.⁷² When the State Patrol learned of the payments it sued Jones and recovered a money judgment against him.⁷³ State Patrol wanted the illicit sums Jones received deducted from his disability benefits.⁷⁴

Later, Jones filed for bankruptcy under Chapter 7.⁷⁵ Although the bankruptcy court discharged Jones' debt to State Patrol, State Patrol continued to deduct sums from Jones' disability benefits, so Jones sought sanctions.⁷⁶ In its defense, State Patrol contended that the sums it continued to deduct amounted to a recoupment of disability benefits unlawfully paid to Jones.⁷⁷ At bottom, the issue boiled down to whether the State Patrol's deductions from Jones' disability benefits amounted to a recoupment which survives bankruptcy or was deemed a setoff which is dischargeable.⁷⁸ The court concluded that the sums involved were a recoupment and ruled in favor of the State Patrol.⁷⁹

Some public employers have begun offering a new type of disability insurance coverage that compensates employees who are killed or gravely injured during their commute to work.⁸⁰ For example, the City of Phoenix, Arizona, purchased "commuter insurance policies after two [city] employees . . . , one of them a police officer, were killed on the way to work."⁸¹

69. See generally S. 304, 108th Cong. (2003).

70. 289 B.R. 188 (Bankr. M.D. Fla. 2002).

71. *Id.* at 189.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Jones*, 289 B.R. at 189.

76. *Id.* at 190.

77. *Id.*

78. *Id.*

79. *Id.* at 193.

80. Sharon Bernstein, *A New Kind of Insurance: Coverage for the Commute*, L.A. TIMES, July 15, 2003, at B2.

81. *Id.*

Commuter insurance is fairly inexpensive because it only kicks in during commuting and such deaths are infrequent.⁸²

3. Public Pensions

Public pension issues affecting Florida public employees during 2002-2003 include the following:

1. Hollywood's new contract with city employees provides for a bonus check for every year the public union's pension fund investment exceeds expectations.⁸³

2. Skyrocketing pension costs in Hollywood's labor contract with city firefighters might entail a big tax increase for property owners in 2003.⁸⁴

3. Under Florida law, public officials convicted of certain types of crimes must forfeit their pensions.⁸⁵ Miami's Fire and Police Pension Board considered but did not resolve whether a former Miami City Manager was entitled to keep his public pension after he was convicted of misuse of public funds.⁸⁶

4. A United States Bankruptcy judge ordered the Miami Police Relief and Pension Fund to reimburse close to \$1 million to investors fleeced by an accountant for the fund.⁸⁷ The fund board enabled the accountant to execute his scam so the fund could recoup its losses stemming from the accountant's fraudulent tax-exempt bond fund.⁸⁸

5. Chief investment officers of seven state public pension funds urged the Securities and Exchange Commission on June 30, 2003: to act on the power of shareholders to nominate directors to corporate boards; to bar brokers from voting proxies without explicit consent; and to bar company auditors from performing tax consulting work for their audit clients.⁸⁹ The group of state officials consists of "state treasurers and investment officers who

82. *Id.*

83. Elena Cabral, *Hollywood to Consider General Employee Pact, Pay Raises*, MIAMI HERALD, Sept. 18, 2002, at 5B.

84. Elena Cabral, *Pension Costs Surprise Officials*, MIAMI HERALD, Oct. 22, 2002, at 1B; see also Elena Cabral, *Pension Shock is Blamed on Mix-Up*, MIAMI HERALD, Oct. 23, 2002, at 3B.

85. FLA. STAT. § 112.3173(3) (2002).

86. *Ex-manager May Hear Pension Decision Today*, MIAMI HERALD, Jan. 25, 2003, at 3B; see *Season's Greetings from Behind Bars*, MIAMI HERALD, Jan. 7, 2002, at 3B.

87. Jay Weaver, *Miami Police Fund Ordered to Repay Bilked Investors*, MIAMI HERALD, Apr. 15, 2003, at 6B.

88. *Id.*

89. Kathy M. Kristof, *California; States Urge Faster Wall St. Reform; The Officers Who Oversee Public Pension Funds Say the SEC Needs to Act Quickly on Shareholder Rights Issues*, L.A. TIMES, July 1, 2003, at C2.

serve as trustees of public pension funds that invest the assets of [public] employees.”⁹⁰

4. Health Benefits

Under the Age Discrimination in Employment Act (“ADEA”), an employer owes no duty to grant health benefits, which are otherwise covered by Medicare.⁹¹ But in 2000, the Third Circuit Court of Appeals ruled, in *Erie County Retirees Association v. County of Erie, Pennsylvania*,⁹² that a public employer violates the ADEA when it accords Medicare-eligible retirees fewer health insurance benefits than those accorded non-Medicare eligible retirees.⁹³ In response, the Equal Employment Opportunity Commission drafted regulations that would permit employers to cut back or eliminate health benefits when a retiree becomes eligible for Medicare without running afoul of the ADEA.⁹⁴

Federal law, such as the 1996 Health Insurance Portability and Accountability Act (“HIPAA”), curtails the use of exclusions for preexisting conditions when an employee moves from one job to another.⁹⁵ Pursuant to this federal statute, the Department of Health and Human Resources issued a “Privacy Rule,” which includes an April 14, 2003 compliance deadline for virtually all covered entities.⁹⁶ In addressing the department’s power to issue this rule, the Fourth Circuit Court of Appeals ruled, in *South Carolina Medical Association v. Thompson*, that the provisions of HIPAA that govern rulemaking do not improperly delegate legislative power to the Department of Health and Human Services.⁹⁷

“Employers and managed care companies paid \$1.5 billion to \$3 billion through higher [health insurance] rates to cover part of the \$24 billion hospitals spent caring for [uninsured] patients . . . in 2001.”⁹⁸ According to some experts, employers are subsidizing the uninsured at the expense of their own

90. *Id.*

91. Regulations Relating to Labor, 29 C.F.R. § 1625.10(e) (2003).

92. 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2003).

93. *Id.* at 215.

94. *EEOC Proposal Would Allow Retirement Plans to End at Medicare Without Age Act Violation*, 71 U.S.L.W. 2088 (2002).

95. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, 1940 (codified at 42 U.S.C. § 201 (2000)).

96. *S.C. Med. Ass’n v. Thompson*, 327 F.3d 346, 349 (4th Cir. 2003).

97. *Id.* at 352.

98. Milt Freudenheim, *Businesses Begin to Consider the Cost for the Uninsured*, N.Y. TIMES, Mar. 6, 2003, at C5.

employees.⁹⁹ For this reason, some insurers are supporting proposals for universal health insurance.¹⁰⁰ Florida is one of a dozen states that permit health plans to provide lower-cost policies to the uninsured that omit some or all state mandates.¹⁰¹

Of all benefits offered by employers, the cost of health insurance has risen far faster and far more. For example, Fort Lauderdale city employees face huge hikes in their health insurance premiums in 2003: employee contributions for families under the least costly option will increase from \$40 to \$82.28 per worker every two weeks.¹⁰² For its part, the city pays \$1.6 million a year to ease the burden on employees.¹⁰³ Fort Lauderdale has a self-funded health insurance plan which enabled it to offer its workers a wide choice of doctors.¹⁰⁴

5. Unemployment Compensation

Under Florida law, an employee who is “discharged for misconduct connected with . . . work” is disqualified from receiving employment benefits.¹⁰⁵ In *Anderson v. Unemployment Appeals Commission*,¹⁰⁶ Anderson had served several years as a senior community corrections officer for Orange County, Florida.¹⁰⁷ She was fired for misrepresentations in her efforts to convince “a judge to sign a violation of probation warrant before the defendant’s probation period expired.”¹⁰⁸ Subsequently, the Division of Unemployment Compensation of the Florida Department of Labor and Employment Securities disqualified her from receiving unemployment benefits for “misconduct connected with work.”¹⁰⁹ An unemployment compensation appeals referee ruled Anderson was entitled to benefits, but this decision was reversed by the unemployment appeals commission.¹¹⁰

On appeal, the Fifth District Court of Appeal made clear that “in determining whether misconduct has occurred, the statute should be liberally con-

99. *Id.*

100. *Id.*

101. *Id.*

102. Brad Bennett, *City Workers Health Insurance Rates Up*, MIAMI HERALD, Feb. 7, 2003, at 6B.

103. *Id.*

104. *Id.*

105. FLA. STAT. § 443.101(2) (2001).

106. 822 So. 2d 563 (Fla. 5th Dist. Ct. App. 2002).

107. *Id.* at 564.

108. *Id.*

109. *Id.* at 564–65.

110. *Id.* at 565.

strued in favor of the employee and in favor of awarding benefits.”¹¹¹ After reviewing the record, the court concluded that Anderson’s conduct amounted at most to poor judgment, and did not constitute willful, wanton, or deliberate acts, and therefore was not misconduct as defined by statute.¹¹² Anderson’s poor judgment did not disqualify her from receiving unemployment benefits.¹¹³

6. Workers’ Compensation

Florida’s Insurance Commissioner, Tom Gallagher, told the Miami Herald that the “state’s workers’ compensation system is failing,” and urged the legislature to reform the system in a special session.¹¹⁴ Among other proposals, the Commissioner recommended premium reductions for Florida employers and better delivery of medical services to insured workers, but rejected a 21.5% rate increase urged by the industry.¹¹⁵ Instead, he agreed to an increase that would raise rates an average of fifteen percent for most businesses in 2002.¹¹⁶ A specific company’s rate increase is tied to its safety record and the nature of work undertaken among other factors.¹¹⁷ “[W]orkers’ compensation rates in Florida [rank] among the highest in the country.”¹¹⁸ At the same time, benefits paid to Florida employees injured on the job are paltry when compared with most states.¹¹⁹ Some insurance companies no longer do business in Florida given that studies “found their costs for workers’ comp[ensation] were 127 percent of the premium.”¹²⁰

7. Occupational Health and Safety Issues

Violence in schools is a growing problem, so most states prohibit public employees from carrying concealed guns on school property.¹²¹ Unlike most states, however, Utah enacted a law “allowing teachers and other public

111. *Anderson*, 822 So. 2d at 566 (citing *Mason v. Load King Mfg. Co.*, 758 So. 2d 649, 655 (Fla. 2000)).

112. *See id.* at 567–68.

113. *Id.* at 569.

114. Gregg Fields, *Workers’ Comp Issue in Limbo*, MIAMI HERALD, Nov. 14, 2002, at 1C.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Fields, *supra* note 114.

120. *Id.*

121. John R. Lott, Jr., *Letting Teachers Pack Guns Will Make America’s Schools Safer*, L.A. TIMES, July 13, 2003, at M5.

workers to carry concealed guns on school property.”¹²² Today thirty-five states have right-to-carry laws that issue permits for concealed weapons after applicants pass a criminal background check, pay fees, and sometimes, undergo training.¹²³ The effect of this law may increase the odds that someone will be able to protect himself and strengthen deterrence.¹²⁴ Before 1995, federal law allowed teachers with concealed-handgun permits to carry guns at school in some states.¹²⁵ According to one study, individuals with guns helped stop nearly one-third of public school shootings since 1997.¹²⁶

C. Ownership of Copyright

Under federal copyright law, a “work made for hire” considers the employer the author of the work “unless the parties have expressly agreed otherwise in a written instrument signed by them”¹²⁷ In *Genzmer v. Public Health Trust of Miami-Dade County*,¹²⁸ a former employee and his employer contested ownership of a computer program that the former employee designed during the time he was working for the employer.¹²⁹ “Genzmer wrote the program . . . on his own time, during non-business hours, and using his home computer.”¹³⁰ Genzmer conducted the test phase of the program’s development on his former employer’s computers.¹³¹ Moreover, Genzmer secured a copyright in the software.¹³²

The federal district court began its analysis by making clear that Genzmer’s copyright certificate shifted the burden to the employer “to overcome the presumption of the validity of Genzmer’s copyright in the software.”¹³³ The court spelled out the “two elements to the work for hire definition: (1) the author must be an employee, and (2) the work must be [developed] within the scope of the [employee’s] employment.”¹³⁴ Since Genzmer was clearly an employee, the court turned to the three-part test governing whether an employee has developed a work within the scope of employment:

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See Lott, *supra* note 121.

127. 17 U.S.C. § 201(b) (2000).

128. 219 F. Supp. 2d 1275 (S.D. Fla. 2002).

129. *Id.* at 1276.

130. *Id.* at 1277.

131. *Id.*

132. *Id.* at 1278.

133. *Genzmer*, 219 F. Supp. 2d at 1279.

134. *Id.* at 1279–80.

“(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master.”¹³⁵

Addressing the first element, the court ruled that Genzmer’s creation of the computer program was “incidental to his authorized acts of [conducting] a research program, acts he was clearly employed to perform.”¹³⁶ As for the second element, the court made clear that the key is that Genzmer created the program during the time period he was hired to complete the research program.¹³⁷ Turning finally to the third element, the court concluded Genzmer’s work was driven, “at least in part,” by a motive to serve his employer.¹³⁸ This was evidenced by the fact that the program was tailored to suit his employer’s needs and by the fact that the “program was [actually] used in the [d]epartment to computerize reports.”¹³⁹ For these reasons, the court concluded that the computer program was “work made for hire” and Genzmer was not entitled to the copyright.¹⁴⁰

IV. DISCIPLINE, DISCHARGE, DISCRIMINATION, AND REMEDIES

A. *Retaliation, Whistle-blowing, and the First Amendment*

1. Retaliation

To establish a prima facie case of retaliation, a plaintiff must show that: 1) the employee was engaged in protected activity; 2) the employer was aware of that activity; 3) the employee suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action.¹⁴¹ Two Florida cases raised retaliation issues,¹⁴² calling into question the meaning of an “adverse employment action” and what constitutes a “causal connection.”¹⁴³

Broward County, Florida, reached a settlement with its former human rights division director who claimed her dismissal was retaliation for filing her own racial bias suit against the county with the Equal Employment Op-

135. *Id.* at 1280 (quoting RESTATEMENT (SECOND) OF AGENCY § 228 (1957)).

136. *Id.* at 1281.

137. *Id.* at 1282.

138. *Genzmer*, 219 F. Supp. 2d at 1282.

139. *Id.* at 1283.

140. *Id.*

141. *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1155 (11th Cir. 2002).

142. *See id.*; *State v. Fla. Comm’n on Human Relations*, 842 So. 2d 253 (Fla. 1st Dist. Ct. App. 2003).

143. *See Brochu*, 304 F.3d at 1155.

portunity Commission (“EEOC”).¹⁴⁴ While Broward’s Human Rights Board accused her of failing to investigate discrimination claims, the former employee pointed out that she was terminated despite good evaluations and raises over nineteen years.¹⁴⁵

2. Whistle-blowing

Under Florida’s Whistle-blower’s Act, state agencies are enjoined from taking adverse action against state employees who make protected disclosures to appropriate authorities.¹⁴⁶ In *State v. Florida Commission On Human Relations*, Ms. Georgalis, a Department of Transportation (“DOT”) manager, opted for resignation only in response to coercion.¹⁴⁷ Ms. Georgalis claims she was discharged because she took part in a complaint filed by a contractor under her supervision.¹⁴⁸ Ms. Georgalis filed a whistle-blower complaint with the Florida Commission on Human Rights (“FCHR”).¹⁴⁹ DOT refused to reinstate Ms. Georgalis, claiming she resigned her position.¹⁵⁰ The circuit judge ruled that Ms. Georgalis was in fact dismissed and so ordered the DOT to temporarily reinstate her pending the final outcome of the complaint.¹⁵¹

On appeal, the First District Court of Appeal addressed FCHR’s failure to follow the statutory deadlines.¹⁵² The court excused FCHR’s failure for the following reasons: 1) the statute provides no remedy;¹⁵³ 2) time limit statutes are directory rather than mandatory;¹⁵⁴ and 3) it would not serve the Whistle-blower Act’s legislative purpose to bar a complaining employee from securing relief owing to FCHR’s failure to follow statutory directives.¹⁵⁵

In *Allocco v. City of Coral Gables*,¹⁵⁶ former university public safety officers unsuccessfully sued the city and university alleging, among other

144. Brad Bennett, *Fired Human-Rights Official, County Agree to Settlement Terms*, MIAMI HERALD, Oct. 15, 2002, at 5B.

145. *Id.*

146. FLA. STAT. § 112.3187(4) (2002).

147. 842 So. 2d at 254.

148. *Id.* at 254–55.

149. *Id.* at 254.

150. *Id.* at 255.

151. *Id.*

152. *Fla. Comm’n on Human Relations*, 842 So. 2d at 253.

153. *Id.* at 256.

154. *Id.*

155. *Id.*

156. 221 F. Supp. 2d 1317 (S.D. Fla. 2002).

things, that they were discharged for reasons other than their alleged whistle-blowing activities.¹⁵⁷ On the whistle-blower counts, the public employees lost on the following grounds: 1) they failed to show that they had exhausted administrative state remedies;¹⁵⁸ 2) the public employees' whistle-blower claims against the university were time-barred;¹⁵⁹ 3) the public employees failed to demonstrate a causal connection between their discharge and their protected activity of reporting alleged wrongdoing by the city and university;¹⁶⁰ and 4) the university identified a legitimate, non-pretextual reason for dismissing the public safety officers.¹⁶¹ They violated a department order barring "bicycle patrol officers from riding together and prohibiting more than one bicycle patrol officer per shift;" the officer remained silent in response to questions posed by the supervisor investigating the incident.¹⁶²

3. The First Amendment

When a public employee alleges retaliation for exercise of free speech rights, a court must first assess the legal issues of whether the employee's speech was on a matter of public concern and whether the employee's interest in speaking outweighs the employer's interest in efficient public service.¹⁶³ Then, the fact-finder assesses whether the speech played a significant role in the adverse employment action and whether the employer would have made the same decision even in the absence of the protected speech.¹⁶⁴ This is known as the *Pickering* balancing test.¹⁶⁵

Over the last year, two state cases within the Eleventh Circuit have addressed issues raised by the *Pickering* balancing test. One case simply noted a circuit court split over whether the test for deciding if a public employee's free speech rights have been violated, i.e., the *Pickering* balancing test, also governs freedom of association claims.¹⁶⁶ In *Board of Regents v. Snyder*,¹⁶⁷ the *Pickering* balancing test arose in the context of whether supervisors were

157. *Id.* at 1323–24.

158. *Id.* at 1366.

159. *Id.* at 1367.

160. *Id.* at 1368.

161. *Allocco*, 221 F. Supp. 2d at 1370.

162. *Id.*

163. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

164. *Bd. of Regents v. Snyder*, 826 So. 2d 382, 388 (Fla. 2d Dist. Ct. App. 2002).

165. *Id.*

166. *See, e.g., Acevedo-Delgado v. Rivera*, 292 F.3d 37, 45 n.11 (1st Cir. 2002) (citing *Tang v. R.I. Dep't of Elderly Affairs*, 163 F.3d 7, 11 n.4 (1st Cir. 1998) (noting, without taking part in, the split between the Seventh and Eleventh Circuits over this issue)).

167. 826 So. 2d at 382.

entitled to qualified immunity.¹⁶⁸ Immunity, the court made clear, turns in part upon the nature of the constitutional right asserted and the degree to which that right is well established within the law.¹⁶⁹ It is the rare First Amendment claim that survives a qualified immunity defense.¹⁷⁰ Turning to the first element of *Pickering*, while Snyder alleged that his speech was a matter of public concern because it involved violations of state law and ethical standards, the court concluded that Snyder was speaking primarily as an employee upon matters of personal interest rather than as a citizen upon matters of public concern.¹⁷¹ Qualified immunity protects government actors unless their conduct violates clearly established federal statutory or constitutional rights.¹⁷² Under the First Amendment, “a right is clearly established only if the plaintiff can provide case precedent involving essentially the same speech or show that no reasonable person could believe that the first two prongs of *Pickering* had not been met.”¹⁷³ Since no case law involving the same speech exists, and since Snyder’s speech flunked the first prong of *Pickering*, the court concluded that reasonable people could believe that Snyder’s speech was not protected under the first two prongs of *Pickering*, thus the supervisors were entitled to qualified immunity.¹⁷⁴

In *Brochu v. City of Riviera Beach*,¹⁷⁵ a former police officer alleged that he faced adverse employment actions in response to conduct he claimed was protected by the First Amendment.¹⁷⁶ The Eleventh Circuit began its analysis by making clear that “[w]hether a plaintiff engaged in speech protected by the First Amendment is a question of law which must be determined by the district court before a § 1983 claim can be submitted to the jury.”¹⁷⁷ Turning to the first element in *Pickering*, the court concluded that speech involving corruption and mismanagement of a police department “might be a matter of public concern.”¹⁷⁸ What doomed plaintiff’s case, however, was the fourth prong, the “but-for” causation element of the *Pickering* balancing test.¹⁷⁹ No reasonable jury, the court insisted, could

168. *Id.* at 387–88.

169. *Id.* at 388.

170. *Id.*

171. *Id.* at 389.

172. *Snyder*, 826 So. 2d at 390.

173. *Id.* at 390 (citing *Martin v. Baugh*, 141 F.3d 1417, 1420 (11th Cir. 1998)).

174. *Id.*

175. 304 F.3d 1144 (11th Cir. 2002).

176. *Id.* at 1147.

177. *Id.* at 1155 (citing *Bryson v. City of Waycross*, 888 F.2d 1562, 1566 n.2 (11th Cir. 1989)).

178. *Id.* at 1158.

179. *Id.* at 1159.

deny that the city had a strong “legitimate reason for placing Brochu on paid administrative leave.”¹⁸⁰ By creating a secret plan to overthrow his superiors and by sharing that plan with members of the community, Brochu knew he would cause havoc in the police department.¹⁸¹ For these reasons, the court concluded that the district court erred when it rejected the city’s “motion for judgment as a matter of law on the § 1983 claim.”¹⁸²

The United States Supreme Court expanded governmental liability under the First Amendment in two rulings rendered in 1996, *O’Hare Truck Service, Inc., v. City of Northlake*¹⁸³ and *Board of County Commissioners v. Umbehr*.¹⁸⁴ In these two seminal cases, the Court ruled that the First Amendment protects at-will independent contractors against dismissal in retaliation for political activity.¹⁸⁵ However, lower courts continue to struggle over what constitutes an ongoing independent contractor relationship.¹⁸⁶ For example, in *Mangieri v. DCH Healthcare Authority*,¹⁸⁷ the Eleventh Circuit held that a government contractor who had previous contracts for the same sort of services before being denied contract renewal over free speech had an ongoing commercial relationship with the government sufficient to sustain its First Amendment claim, even absent an automatic renewal provision in its contract.¹⁸⁸

B. *Employment Discrimination*

1. Generally

Although the pair of Supreme Court rulings endorsing affirmative action, handed down June 23, 2003, narrowly involved student admissions policies at public colleges and universities,¹⁸⁹ there is already speculation that these decisions might guide “employers toward wider acceptance of affirmative action policies in hiring, training and promoting workers.”¹⁹⁰

180. *Brochu*, 304 F.3d at 1159.

181. *Id.* at 1160.

182. *Id.* at 1161.

183. 518 U.S. 712 (1996).

184. 518 U.S. 668 (1996).

185. *O’Hare*, 518 U.S. at 726; *Umbehr*, 518 U.S. at 685.

186. *See Mangieri v. DCH Healthcare Auth.*, 304 F.3d 1072 (11th Cir. 2002), *cert. dismissed*, 123 S. Ct. 1511 (2003).

187. *Id.*

188. *Id.* at 1076.

189. *E.g.*, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

190. Richard B. Schmitt & Justin Gest, *Supreme Court Rulings; Decisions May Lead to More Lawsuits*, L.A. TIMES, June 24, 2003, at A16.

On June 9, 2003, the United States Supreme Court ruled that the Civil Rights Act of 1991 intended to make it easier for victims of discrimination to win their cases.¹⁹¹ Specifically, in a “mixed motive” case, circumstantial evidence of bias, even though short of “direct evidence” of discrimination, is sufficient for the case to go to the jury.¹⁹²

On March 6, 2003, Senator Susan Collins (R-ME) re-introduced the Civil Rights Tax Relief Act of 2003,¹⁹³ under which employment discrimination damages would be excluded from income taxes.¹⁹⁴

On June 12, 2003, the House of Representatives enacted legislation that would transfer all class action lawsuits, including employment discrimination class actions, from state to federal courts, if the claims totaled \$5,000,000 and if the key defendant and fewer than one-third of the claimants were from different states.¹⁹⁵ Federal courts are widely regarded as less sympathetic to plaintiffs in class action suits.¹⁹⁶

2. Race

A Jamaican-born, former Fort Lauderdale firefighter lost her suit against the city based on claims of race, gender, and nationality discrimination.¹⁹⁷ A federal jury disagreed with a ruling from the EEOC that the city had targeted the former firefighter.¹⁹⁸ She received a written reprimand for injuring a duck while driving to a fire call while, allegedly, her white male counterparts suffered no discipline for similar conduct.¹⁹⁹

In December 2002, Fort Lauderdale agreed to correct long-standing discriminatory practices in order to settle its largest race bias lawsuit.²⁰⁰ The settlement came in the wake of warnings by the Department of Justice that the city would be sued if it refused to settle chronic claims of employment bias.²⁰¹

191. See *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2155 (2003).

192. *Id.* at 2154.

193. S. 557, 108th Cong. (2003).

194. *Id.*

195. 149 Cong. Rec. H5281-03 (2003).

196. Justin Gest, *For Third Time, House OKs Reforming Class-Action Suits*, L.A. TIMES, June 13, 2003, at A24.

197. Brad Bennett, *Worker Loses Bias Suit Against Fort Lauderdale*, MIAMI HERALD, Sept. 24, 2002, at 1B.

198. *Id.*

199. *Id.*

200. Brad Bennett, *Lauderdale, City Employee Agree to Settle Racial Bias Suit*, MIAMI HERALD, Dec. 14, 2002, at 9B.

201. *Id.*

3. National Origin

On December 2, 2002, the EEOC issued a compliance manual on language issues as guidance on how employers can avoid committing national origin discrimination.²⁰²

4. Gender

Women make up about two percent of career firefighters nationwide, and hazing incidents have left them uncertain as to whether they are facing sexual harassment.²⁰³ The City of Coral Springs Fire Department faced charges of violating its own policies which ban extreme misconduct which is defined as ““engaging in any intentional horseplay or misconduct which may inflict bodily harm on anyone.””²⁰⁴

An employer’s liability for sexual harassment expands if it fails to remedy complaints.²⁰⁵ In *Watson v. Blue Circle, Inc.*,²⁰⁶ the Eleventh Circuit ruled that an employer may have failed to take quick and proper corrective action in response to a sexual harassment complaint.²⁰⁷ For example, the manager’s report of the incident made no mention that there was an offer of money.²⁰⁸ Moreover, not only did the manager fail to alert human resources, but he also failed to submit the victim’s own written report to human resources.²⁰⁹

Grooming cases fall into three categories: hair, dress, and appearance.²¹⁰ Employers are on a firmer legal footing when grooming codes apply equally to both genders.²¹¹ The Walt Disney Company has yet to learn this rule, but it is making progress. In 1994, female workers were allowed to use

202. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, PUB. NO. 915.003, COMPLIANCE MANUAL SECTION 13: NATIONAL ORIGIN DISCRIMINATION (2002), available at <http://www.eeoc.gov/docs/national-origin.html>.

203. Noah Bierman, *Hazing at Fire Station Distressing*, MIAMI HERALD, Mar. 23, 2003, at 1BR.

204. *Id.*

205. *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1257 (11th Cir. 2003) (citing *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278–80 (11th Cir. 2002); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997)).

206. *Id.* at 1252.

207. *Id.* at 1261.

208. *Id.*

209. *Id.* at 1261–62.

210. *See, e.g.*, Richard Verrier, *For Disney Workers, a Hipper Place on Earth*, L.A. TIMES, July 12, 2003, at C1.

211. *See id.*

eye makeup; in 2000, men were entitled to grow mustaches.²¹² In 2003, new rules allow cornrows on men's heads, hoop earrings in women's ears, and female employees may wear open-toe and open-heel shoes.²¹³ Sandals remain banned.²¹⁴

To prove sex discrimination under Title VII, the employee must establish that the misconduct for which she was disciplined was the same or similar to what her counterparts engaged in, but that they were not similarly disciplined.²¹⁵ In *Ratley v. City of Jacksonville*,²¹⁶ the Eleventh Circuit ruled that the district court did not err in granting summary judgment to the public employer given that the plaintiff did not offer a single potential comparator.²¹⁷

5. Age

The Age Discrimination in Employment Act ("ADEA") protects workers forty years of age and over.²¹⁸ Until recently, younger workers shut out of job opportunities have not managed to sell courts on the notion of "reverse age discrimination." In 2002, however, the Sixth Circuit ruled that the ADEA does recognize claims of "reverse discrimination," in which employees younger than forty received fewer benefits than older employees.²¹⁹ Indeed, on April 21, 2003, the Supreme Court agreed to decide whether "reverse discrimination" claims are actionable under the ADEA.²²⁰

On a statute of limitations issue, under the ADEA, the Eleventh Circuit ruled in *Wright v. AmSouth Bancorporation*²²¹ that an ADEA claim accrued on the date the employer notified the employee that he was being terminated, not on the earlier date when he was notified that he would not earn a salary increase or bonus.²²²

212. *Id.*

213. *Id.*

214. *Id.*

215. *See, e.g., Anderson v. WBGW-42*, 253 F.3d 561, 564 (11th Cir. 2001).

216. No. 01-16291, 2002 WL 1155560, at *1 (11th Cir. Apr. 22, 2002), *cert. denied*, 537 U.S. 885 (2002).

217. *Id.*; Petition for Writ of Certiorari at *3, *Ratley v. City of Jacksonville*, 123 S. Ct. 118 (2002) (No. 02-134), *available at* 2002 WL 32134883.

218. 29 U.S.C. § 631(a) (2000).

219. *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 467 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

220. David G. Savage, *Supreme Court to Hear Reverse Age Bias Case*, L.A. TIMES, Apr. 22, 2003, at A15.

221. 320 F.3d 1198 (11th Cir. 2003).

222. *Id.* at 1201-02.

In 1998, the Supreme Court addressed the question whether workers who secured enhanced severance packages in exchange for waiving any age-related claims must return their additional benefits before they can challenge the waivers.²²³ In *Oubre v. Entergy Operations Inc.*,²²⁴ the Court ruled that employees who sign releases waiving all claims against the employer and keep the money for signing such releases do not waive ADEA claims unless the release meets the requirements spelled out in federal law for release of ADEA claims.²²⁵ The Eleventh Circuit, in *Watkins v. Nortel Networks Inc.*,²²⁶ held that *Oubre* does not apply when the plaintiff has not raised an ADEA claim.

6. Disability

The Americans with Disabilities Act (“ADA”) makes it unlawful for employers to deny reasonable accommodation for the known physical or mental limitations of an otherwise qualified individual with a disability, unless doing so gives rise to undue hardship.²²⁷ The ADA also regulates pre-employment medical examinations and inquiries.²²⁸

The ADA protects employers with fifteen or more employees.²²⁹ In *Clackamas Gastroenterology Associates, P.C. v. Wells*,²³⁰ the Supreme Court ruled that the common law test of control governs whether four director-shareholder physicians should be counted as employees toward the fifteen-employee minimum for determining whether an employer is bound by the ADA.²³¹

7. Same-sex Bias

While Title VII does not prohibit discrimination on the basis of sexual orientation as such, the Supreme Court, in *Oncale v. Sundowner Offshore Services, Inc.*,²³² ruled that some forms of same-sex harassment may violate Title VII if the bias took place “because of sex.”²³³ Moreover, the Supreme

223. See generally *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

224. 522 U.S. at 422.

225. *Id.* at 427.

226. No. 02-10330, 2002 WL 1799704, at *1 (11th Cir. July 23, 2002).

227. 42 U.S.C. § 12112(b)(5)(A) (2000).

228. § 12112(d)(2).

229. 42 U.S.C. § 12111(5)(A) (2000).

230. 123 S. Ct. 1673 (2003).

231. *Id.* at 1675.

232. 523 U.S. 75 (1998).

233. *Id.* at 81.

Court's ruling on June 26, 2003, in *Lawrence v. Texas*,²³⁴ striking down Texas' sodomy law that only penalized same-sex sodomy and specifically overruling *Bowers v. Hardwick*²³⁵ will make it harder for employers to tolerate same-sex bias.

In *De La Campa v. Grifols America, Inc.*,²³⁶ the Third District Court of Appeal of Florida held that a woman who alleged that her superior sexually harassed her, including insults and offensive behavior toward her owing to her sexual orientation, did not state a claim for intentional infliction of emotional distress.²³⁷ The court failed to find the requisite level of outrageousness on the part of the abuser.²³⁸

8. Religion

In the public sector both the First Amendment and Title VII protect public employees against religious discrimination.²³⁹ In *Lubetsky v. Applied Card Systems, Inc.*,²⁴⁰ the Eleventh Circuit ruled that an unsuccessful job applicant, who offered no proof that the employer knew that the applicant was Jewish when it revoked its provisional offer of employment, failed to establish a prima facie case of religious discrimination in violation of Title VII.²⁴¹

Claims of religious discrimination in the workplace have been rising steadily even before anti-Muslim incidents that occurred in the wake of the September 11th terrorist attacks.²⁴² A Pentecostal Christian, whose religion bars women from wearing pants, is on a collision course if the job requires a uniform that includes pants.²⁴³ While religious bias claims comprise only a fraction of all work-place bias claims, they are rising at a far quicker pace, especially claims of retaliation against Muslims.²⁴⁴ Title VII requires employers to make reasonable accommodations for employees' religious beliefs and practices.²⁴⁵ In one case, a postal worker alleged that he was harassed

234. 123 S. Ct. 2472 (2003).

235. 478 U.S. 186 (1986).

236. 819 So. 2d 940 (Fla. 3d Dist. Ct. App. 2002).

237. *Id.* at 944.

238. *Id.*

239. 42 U.S.C. § 2000e-2(a)(1) (2000).

240. 296 F.3d 1301 (11th Cir. 2002).

241. *Id.* at 1307.

242. Adam Geller, *Workplace Tension over Religious Diversity*, MIAMI HERALD, Jan. 22, 2003, at 1C.

243. *Id.*

244. *Id.*

245. U.S. CONST. amend. I; 42 U.S.C. § 2000e-2(a)(1).

because he practices Wicca, a form of witchcraft.²⁴⁶ He was not allowed to wear a T-shirt that said “Born Again Pagan” while crucifixes could be worn.²⁴⁷

C. Remedies

1. Attorneys’ Fees

Many federal statutes, including employment discrimination statutes, provide for awarding attorneys’ fees to a prevailing plaintiff.²⁴⁸ Whether an award of attorneys’ fee is proper entails a two-step inquiry.²⁴⁹ First, the party must be a prevailing party in order to recover.²⁵⁰ Second, the fee requested by the prevailing party must be reasonable.²⁵¹ The primary consideration in assessing the reasonableness of a fee is the degree of success obtained.²⁵²

Courts disagree over what constitutes a “prevailing party” when a lawsuit is settled. For example, the Ninth Circuit has ruled that plaintiffs who secure a settlement in their bias suit against a state agency constitute “prevailing parties” entitled to attorneys’ fees even though the terms fall short of the relief initially sought.²⁵³ By contrast, the Eleventh Circuit noted in *American Disability Association, Inc. v. Chmielarz*,²⁵⁴ that the circuit courts are split over whether a private settlement, without judicial action, amounts “to an alteration in the legal relationship of the parties” sufficient to qualify a plaintiff as a prevailing party entitled to attorneys’ fees.²⁵⁵

In 2001, the Supreme Court issued an opinion narrowing the definition of “prevailing party” for purposes of recovering attorneys’ fees.²⁵⁶ In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,²⁵⁷ the Court rejected the so-called “catalyst test” for awarding attorneys’ fees in federal civil rights cases.²⁵⁸ Under this theory,

246. Geller, *supra* note 242.

247. *Id.*

248. See 42 U.S.C. § 1988(b) (2000).

249. *Id.*

250. *Farrar v. Hobby*, 506 U.S. 103, 109 (1992).

251. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

252. *Id.* at 434.

253. *Richard S. v. Dep’t of Developmental Servs. of Cal.*, 317 F.3d 1080, 1087 (9th Cir. 2003).

254. 289 F.3d 1315 (11th Cir. 2002).

255. *Id.* at 1319, n.2.

256. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001).

257. *Id.*

258. *Id.* at 610.

fees are recoverable if a plaintiff's lawsuit produces the desired alteration in the defendant's conduct.²⁵⁹ Instead, the Court made clear, a prevailing party must also achieve judgment on the merits or a court-ordered consent decree before qualifying for an award of fees.²⁶⁰

The Eleventh Circuit, in *Loggerhead Turtle v. County Council*,²⁶¹ has read *Buckhannon* as applicable only to federal fee-shifting statutes that provide for fee awards to "prevailing parties."²⁶² In other words, the "catalyst theory" remains viable under federal statutes²⁶³ that authorize reasonable attorneys' fees "whenever the court determines such award is appropriate."²⁶⁴

On November 14, 2002, Senator Russ Feingold introduced a bill that would overturn the *Buckhannon* decision and restore the "catalyst theory."²⁶⁵ When an employer requires mandatory arbitration as a condition of employment, can employees be made to bear part of the costs including attorneys' fees? On this question, the Supreme Court of California has ruled that employers cannot shift these costs onto employees.²⁶⁶

Florida law authorizes elected officials, who must defend themselves while in office, to request that their city pay attorneys' fees.²⁶⁷ A former mayor of Weston invoked this law after he paid his own attorneys' fees defending against conflict-of-interest charges while in office.²⁶⁸ In *Florida Department of Insurance v. Amador*,²⁶⁹ a former employee of Florida International University sued the Department of Insurance, claiming that the Department's withdrawal of legal representation for acts committed in the course and scope of his employment constituted a breach of contract.²⁷⁰ Although the court never reached this issue, it did note in passing that there is no constitutional right in Florida to have one's attorneys' fees paid.²⁷¹ Moreover, whether a public employee is entitled to statutory reimbursement for attorneys' fees incurred in defending against acts committed in the course

259. *Id.* at 605.

260. *Id.*

261. 307 F.3d 1318 (11th Cir. 2002).

262. *Id.* at 1326.

263. *Id.* at 1325.

264. *Id.* at 1323 (citing 16 U.S.C. § 1540(g) (2000)).

265. See S. 3161, 107th Cong. (2d Sess. 2002).

266. *Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669, 681 (Cal. 2000).

267. See FLA. STAT. § 111.07 (2002).

268. Jasmine Kripalani, *Ex-Weston Mayor Seeks Payment*, MIAMI HERALD, Aug. 22, 2002, at 5B.

269. 841 So. 2d 612 (Fla. 3d Dist. Ct. App. 2003).

270. *Id.* at 613.

271. *Id.* at 614.

and scope of employment is a matter for “the respective governmental unit . . . not the judiciary.”²⁷²

2. Reinstatement and Back Pay

In *Hoffman Plastic Compounds Inc. v. NLRB*,²⁷³ the United States Supreme Court denied undocumented employees the right to seek reinstatement or back pay because federal law makes it unlawful to hire such workers.²⁷⁴ In light of *Hoffman*, the EEOC decided it will no longer seek these remedies for undocumented employees who are fired or not hired.²⁷⁵ Despite *Hoffman*, however, the DOL will persist in seeking back pay for undocumented workers for violations of the FLSA.²⁷⁶

V. PUBLIC SECTOR, COLLECTIVE BARGAINING ISSUES

A. Public Unions

“Florida . . . is a ‘right-to-work’ state, which means an employee cannot be forced to join a union to hold a job.”²⁷⁷ Many northern states, however, have laws that allow unions to charge non-union members the cost of negotiating for nonmembers.²⁷⁸ For the first time in Florida, a public union has proposed a plan under which non-union members must pay an “administrative fee” to defray the cost of negotiating new contracts that would benefit all bargaining unit workers.²⁷⁹ It is unclear whether such a fee violates Florida’s “right-to-work” laws.²⁸⁰

Many states have enacted statutes modeled on the Federal Hatch Act, which regulates the partisan political activities of public employees.²⁸¹ For

272. *Id.*

273. 535 U.S. 137 (2002).

274. *Id.* at 147–52.

275. Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, EEOC Pub. 915.002 (June 2002), available at <http://www.eeoc.gov/docs/undoc-rescind.html>.

276. See Fact Sheet #48 Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* Decision on Laws Enforced by the Wage and Hour Division, United States Dep’t of Labor (Sept. 2003), available at <http://www.dol.gov/esa/regis/compliance/whd/whdfs48.htm>.

277. Daniel A. Grech, *UTD Seeks to Collect Fee from Nonunion Teachers*, MIAMI HERALD, July 22, 2002, at 3B.

278. *Id.*

279. *Id.*

280. See *id.*

281. 5 U.S.C. § 7324(a) (2000).

example, under a Miami-Dade County School District board rule, “[n]o employee shall use his/her official authority or influence for the purpose of coercing or influencing another person’s vote.”²⁸² Nevertheless, days before Florida’s gubernatorial race in 2002, thousands of public school teachers in Miami-Dade County were asked by their public union to send home a letter to parents endorsing one candidate for governor whose election would “significantly improve public education in Florida.”²⁸³ This endorsement by Florida’s largest teachers’ union has been criticized as an illegal attempt to coerce or influence another person’s vote.²⁸⁴

B. *Collective Bargaining Issues*

Whether certain public employees are entitled to unionize in Florida turns on the statutory definition of “public employee.” In *Murphy v. Mack*,²⁸⁵ the Supreme Court of Florida ruled that deputy sheriffs were not public employees.²⁸⁶ But twenty-two years later, in *Service Employees International Union, Local 16 v. Public Employees Relations Commission*,²⁸⁷ the same court largely undermined the rationale of *Murphy* by ruling that deputy court clerks were public employees entitled to collective bargaining rights under state law.²⁸⁸ In *Coastal Florida Police Benevolent Ass’n v. Williams*,²⁸⁹ the Supreme Court of Florida largely overruled *Murphy* by ruling that deputy sheriffs were “employees” entitled under the Florida Constitution to collectively bargain.²⁹⁰ Applying strict scrutiny, the court concluded there was no compelling state interest in denying deputy sheriffs their right to engage in collective bargaining.²⁹¹

Under the *Florida Statutes*, managerial employees and administrative personnel are prohibited from engaging in collective bargaining.²⁹² In *Dade County School Administrators Ass’n, Local 77 v. School Board of Miami-Dade County*,²⁹³ a public employee union sought to represent a bargaining

282. Matthew I. Pinzur, *Union Asks Dade Teachers to Push McBride in Letters*, MIAMI HERALD, Nov. 2, 2002, at 9B.

283. *Id.*

284. *Id.*

285. 358 So. 2d 822 (Fla. 1978).

286. *Id.* at 826.

287. 752 So. 2d 569 (Fla. 2000).

288. *See id.* at 573–74.

289. 838 So. 2d 543 (Fla. 2003).

290. *Id.* at 545.

291. *Id.* at 552.

292. FLA. STAT. § 447.501(1)(f) (2002).

293. 840 So. 2d 1103 (Fla. 1st Dist. Ct. App. 2003).

unit made up of assistant principals and vice principals.²⁹⁴ The Florida Public Employees Relations Commission denied the union's petition concluding that the assistant principals were managerial employees and administrative personnel.²⁹⁵ On appeal, the court declined to reach the question of the constitutionality of the state statute barring such employees from joining a union.²⁹⁶

In *Ponce Inlet Professional Fire Fighters, Local 4140 v. Town of Ponce Inlet*,²⁹⁷ a union representing firefighters filed an unfair labor practice claim with the state labor board alleging that the town had violated state law²⁹⁸ by unilaterally changing the compensation of firefighters by putting in place a new pay plan.²⁹⁹ The board found that while the town was aware that the union opposed the new pay plan, it failed to make an effective demand to bargain.³⁰⁰ Absent such demand, the board ruled that the union did not establish a prima facie statutory violation of the duty to negotiate in good faith over the terms and conditions of employment.³⁰¹

In *International Union of Painters & Allied Trades v. Cape Coral, Local Union 2301*,³⁰² a public union petitioned the state labor board to modify a bargaining unit comprised of clerical and administrative personnel employed by the city.³⁰³ The test for adding positions to an existing bargaining unit is whether the classifications at issue share a "community of interest" with the classifications within the bargaining unit.³⁰⁴ The board accepted the hearing officer's recommendation to add the two classifications to the bargaining unit.³⁰⁵

In *South Walton Professional Firefighters Ass'n v. South Walton Fire District*,³⁰⁶ a firefighters' union filed a bargaining unit clarification petition with the state labor board seeking to exclude the newly created classification of division chief/EMS coordinator from the unit.³⁰⁷ Both the hearing officer and the board dismissed the union's petition, concluding that since the new

294. *Id.* at 1104.

295. *Id.*

296. *Id.*

297. 28 Fla. Pub. Employee Rep. ¶ 33287 (2002).

298. FLA. STAT. § 447.501(1)(a), (c) (2002).

299. *Ponce Inlet*, 28 Fla. Pub. Employee Rep. at ¶ 33287.

300. *Id.*

301. *Id.*

302. 28 Fla. Pub. Employee Rep. ¶ 33288 (2002).

303. *Id.*

304. *Id.*

305. *Id.*

306. 28 Fla. Pub. Employee Rep. ¶ 33289 (2002).

307. *Id.*

position had never been included in the bargaining unit, it was unnecessary to exclude it.³⁰⁸

Often in Florida, when public employees are renegotiating labor contracts with their governmental employers, the two parties resort to public displays to bring pressure to bear on the opposing party to agree to its terms. For example, in January 2003, the United Teachers of Dade threatened to “launch protests across the county and stonewall the district’s plan to start school in early August until the two sides settle on pay increases.”³⁰⁹ Moreover, the teachers’ union refused to negotiate any other term in the contract until salaries had been settled.³¹⁰

C. Arbitration

The Supreme Court of Florida has made it clear that where a public union retains contractual control over the arbitral portion of the grievance procedure and it refuses to process a grievance to arbitration because the complaint lacks merit, the governmental employer owes no duty to arbitrate the dispute.³¹¹ In *Austin v. Pembroke Pines, Fire Department*,³¹² two firefighters scored high enough on a promotion test to be placed on an eligibility list, but were later deleted from the list when a qualification for taking the test changed.³¹³ Without union assistance, the two firefighters sought to arbitrate this dispute with the city; the city, however, refused to pursue arbitration because the firefighters were not represented by the union.³¹⁴ The firefighters then claimed before the state labor board that the city committed an unfair labor practice by refusing to arbitrate the firefighters’ promotion grievance.³¹⁵ The state labor board summarily dismissed the firefighters’ petition as procedurally defective.³¹⁶ Not only did the petition fail to include the parties’ contract or the grievance, but it also failed to include the names of the individuals involved and the time and place of acts triggering the dispute.³¹⁷

308. *Id.*

309. Matthew I. Pinzur, *Salary Stalemate Prompts Warning by Teachers*, MIAMI HERALD, Jan. 25, 2003, at 3B.

310. *Id.*

311. *Galbreath v. Sch. Bd. of Broward County*, 446 So. 2d 1045 (Fla. 1984).

312. 28 Fla. Pub. Employee Rep. ¶ 33286 (2002).

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Austin*, 28 Fla. Pub. Employee Rep. at ¶ 33286.

Moreover, the charge was time-barred by the six-month statute of limitations.³¹⁸

VI. CONCLUSION

The year spanning from 2002–2003 offered a typical array of public employment law issues. Every stage of employment, from hiring, to the terms of employment, to employment discrimination, to discipline and discharge, summons up its own set of issues at the federal, state, and local levels. Post-retirement also encompasses such issues as public pensions, disability retirement, death benefits, and others. In contrast to private sector employment, which by and large goes unnoticed by the media, public sector employment draws widespread microscopic news attention. Besides case law and legislative enactments, news stories provide a wealth of curious facts and figures in this precinct of the law.

318. *Id.*