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## 2002 Survey of Florida Public Employment Law

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I. INTRODUCTION

This article surveys the various stages of public employment in Florida, starting logically enough with the law governing the hiring, retention, and promotion of employees. Part II encompasses such issues as employers conducting background checks on potential employees, as well as liability a public employer may face for such emerging torts as negligent hiring. The question of who owns inventions produced by employees at work is also considered. Moreover, the recurring knotty issue of employers hiring family members is addressed.

Part III plumbs the law governing the terms of employment. This area of the law addresses issues arising over the hours and wages of public employees. It then turns to the array of employee benefits that pose legal issues concerning disability benefits, death benefits, public pensions, health benefits, family medical leave act benefits, and unemployment benefits, among other miscellaneous items such as privacy in the workplace, and occupational health and safety issues.

Part IV delves into the law governing the disciplining and dismissal of public employees. This wide ranging area encompasses dismissals in retaliation for legal acts committed by public employees, whistle-blowers who are fired for exposing public corruption, and public employees who are cashiered for exercising their First Amendment rights in the workplace. Next, Part IV summarizes current cases and issues arising out of employment discrimination: race, gender, age, disability, and religion. Part IV also touches on procedural due process, remedies for wrongful discharge, Section 1983 claims, and finally turns to a recent United States Supreme Court case

limiting the remedies available to illegal workers who are targeted for discrimination. Finally, Part V explores recent labor issues involving public sector unions and arbitration.

## II. HIRING, RETENTION, AND PROMOTION

### A. *Privatization*

Privatization is the process of converting governmental agencies into private entities that are more responsive to market forces. Florida has taken the lead in this area, but the movement has come under heavy criticism.<sup>1</sup> For example, two years ago services to disabled Floridians seeking work were placed under private management.<sup>2</sup> But recently state auditors recommend ending the project, finding that private management increased costs and delivered far poorer services.<sup>3</sup> Indeed, the agency that oversees the states' federal vocational rehabilitation funding has tagged Florida as the only state likely to lose its federal funding.<sup>4</sup>

### B. *Selection of Trial Judges*

On June 27, 2002, the United States Supreme Court held that rules barring judicial candidates from discussing legal and political issues during the campaign are unconstitutional.<sup>5</sup> The Court struck down, 5-4, limits on Minnesota judicial candidates.<sup>6</sup> The dissenters in the case worried that unbridled judicial campaigns would erode the impartiality of the bench.<sup>7</sup>

Florida's *Code of Judicial Conduct* forbids a would-be judge to "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."<sup>8</sup> This type of restriction on judicial speech was called into question by the Supreme Court ruling in *Republican Party of Minnesota v. White*.<sup>9</sup> The

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1. Carol Marbin Miller, *Privatization Panel Ripped For High Costs, Poor Service*, MIAMI HERALD, Jan. 9, 2002, at 1B.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002); Beth Reinhard & Lesley Clark, *Would-be Judges Free to State Views*, MIAMI HERALD, June 28, 2002, at 18A.

6. *White*, 122 S. Ct. at 2528; Reinhard & Clark, *supra* note 5, at 18A.

7. *White*, 122 S. Ct. at 2546; Reinhard & Clark, *supra* note 5, at 18A.

8. FLA. CODE OF JUDICIAL CONDUCT CANON 7A(3)(d)(ii) (2002).

9. 122 S. Ct. 2528 (2002).

Court ruled that a Minnesota rule, similar to Florida's, unconstitutionally violated the candidate's free speech rights.<sup>10</sup> As one commentator has noted, the ruling does not prevent judicial candidates from signing a voluntary code agreeing to say nothing that might tie their hands to rule a certain way.<sup>11</sup>

### C. *Term Limits*

In *Cook v. City of Jacksonville*,<sup>12</sup> voters imposed a two-term limit on the office of clerk of the circuit court.<sup>13</sup> Plaintiff Cook challenged the term limits ordinance after the supervisor of elections refused to accept Cook's application to run for a third term as clerk of the circuit court.<sup>14</sup> The trial court ruled in favor of Cook, finding nothing in the Florida Constitution that enabled the city to set additional qualifications or disqualifications for the Jacksonville clerk position.<sup>15</sup> On appeal, the Supreme Court of Florida affirmed, concluding that the county charter term limits measure amounted to an unconstitutional effort to create another disqualification from election to office.<sup>16</sup>

### D. *Background Checks*

Many employers are hiring companies that offer outsourcing services to help with background checks in the hiring process.<sup>17</sup> Since the terrorist attacks on September 11, 2001, far more employers are conducting background checks.<sup>18</sup> School districts that fail to ensure that molesting teachers do not continue teaching elsewhere are being sued for civil damages

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10. *Id.* at 2542.

11. Edward Wasserman, *Let Informed Public Elect Judges*, MIAMI HERALD, July 8, 2002, at 11B.

12. 823 So. 2d 86 (Fla. 2002).

13. *Id.* at 87.

14. *Id.* at 88.

15. *Id.*

16. *Id.* at 95.

17. Shannon Tan, *Hiring Out the Hiring and Firing*, MIAMI HERALD, Jan. 27, 2002, at 1E.

18. Eve Tahmincioglu, *Tense Employers Step Up Background Checks*, N.Y. TIMES, Oct. 3, 2001, at C9.

when the teacher abuses again.<sup>19</sup> Some states protect employers, who give unfavorable references, from lawsuits.<sup>20</sup>

#### E. *Promotions*

In *Herold v. University of South Florida*,<sup>21</sup> an associate professor at a public university contested its refusal to give him a formal evidentiary forum regarding the denial of his promotion to full professor.<sup>22</sup> In concluding that the professor suffered no deprivation of liberty or property interests stemming from his damaged professional reputation, the court ruled that no substantial interest was adversely affected that would warrant an evidentiary hearing.<sup>23</sup> In other words, denial of a promotion, to a higher faculty rank, did not implicate a substantial interest that would entitle the professor to a hearing.<sup>24</sup>

#### F. *Nepotism*

Nepotism is the disfavored practice of hiring one's own relatives when new jobs become available.<sup>25</sup> While not illegal under federal law, Florida has enacted anti-nepotism laws with loopholes. Two state lawmakers sponsored a bill<sup>26</sup> that would omit a loophole for school boards after a Miami-Dade County School Board member hired her husband for her personal staff.<sup>27</sup>

#### G. *Negligent Hiring*

The Supreme Court of Florida, in *Malicki v. Doe*,<sup>28</sup> ruled that the First Amendment<sup>29</sup> ban on government involvement in religion does not afford a

19. Diana Jean Schemo, *Teachers in Sex Abuse Cases are Often Silently Transferred*, N.Y. TIMES, June 18, 2002, at A1.

20. *Id.* Laws in at least twenty-six states protect employers from these types of "defamation lawsuits." *Id.*

21. 806 So. 2d 638 (Fla. 2d Dist. Ct. App. 2002).

22. *Id.* at 639-40.

23. *Id.* at 642.

24. *Id.* at 640 (citation omitted).

25. BLACK'S LAW DICTIONARY 1039 (6th ed. 1990).

26. H.R. 65, 2002 Leg., 104th Sess. (Fla. 2002).

27. *Nepotism Targeted In Board Hiring*, MIAMI HERALD, Jan. 30, 2002, at 9B.

28. 814 So. 2d 347 (Fla. 2002).

29. U.S. CONST. amend. I.

shield behind which a church may avoid liability for negligent hiring and supervision of its clergy members.<sup>30</sup>

#### H. Patent Rights

In *City of Cocoa v. Leffler*,<sup>31</sup> city employees invented a bacterial-based system for removing hydrogen sulfide from the Florida aquifer and also hit upon a better method of cleaning the water treatment tanks.<sup>32</sup> In the patent application process, three of the inventors refused to assign their patent rights to the city.<sup>33</sup> During the trial it became known that the city sought a more efficient and cheaper plan which never envisioned that anything new would be invented.<sup>34</sup> The trial court found that the plaintiffs need not assign their patent rights to the city and found no conflict of interest because both parties benefited from the discovery.<sup>35</sup> On appeal, the Fifth District Court of Appeal affirmed.<sup>36</sup>

### III. TERMS OF EMPLOYMENT

#### A. Hours and Wages

The average American works 42.4 hours per week, according to a survey of working hours conducted by RoperASW.<sup>37</sup> In terms of total hours, Americans work, on average, thirty-six more hours per year than a decade ago.<sup>38</sup>

While the national average public school teacher's pay rose thirty-one percent to \$43,000 in the 1990s, Florida's average teacher's salary was under the national average at \$38,230.<sup>39</sup> While Florida teachers' pay rose twenty-five percent in the 1990s, it still fell four percent when factoring in

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30. *Churches Can Be Sued, Court Rules*, N.Y. TIMES, Mar. 17, 2002, at 30.

31. 803 So. 2d 869 (Fla. 5th Dist. Ct. App. 2002).

32. *Id.* at 870-71.

33. *Id.* at 871.

34. *Id.* at 872.

35. *Id.*

36. *Leffler*, 803 So. 2d at 874.

37. Diane E. Lewis, *South Koreans put in Most Time Working, According to Survey*, THE BOSTON GLOBE, reprinted in MIAMI HERALD, Nov. 26, 2001, Business at 32.

38. *Id.* According to the International Labor Organization, Americans work 1,978 hours per year, an increase from 1,942 hours per year just ten years ago. *Id.*

39. *Average Teachers' Pay Jumped 31% in 1990s to \$43,000, Union Says*, MIAMI HERALD, Apr. 8, 2002, at 10A.

inflation.<sup>40</sup> Nationally, elementary school principals average \$73,000; middle school principals earn \$78,000; and high school principals earn about \$84,000.<sup>41</sup>

The Supreme Court denied certiorari of a 2001 federal appeals court ruling that Congress acted constitutionally when it rejected cost-of-living raises for federal judges.<sup>42</sup> Article III of the Constitution ensures to federal judges “a Compensation, which shall not be diminished during their Continuance in Office.”<sup>43</sup> Studies indicate that federal judges have lost more ground to inflation than public and private employees in other occupations.<sup>44</sup>

The events of September 11, among other things, reduced Florida’s revenues dramatically, creating a budget crunch that has led many school boards to take many drastic cost-cutting measures.<sup>45</sup> For example, “[t]he Miami-Dade School Board voted . . . to impose a two-day emergency pay cut on almost all district employees.”<sup>46</sup> Without economizing, the district “would be ‘teetering on the possibility’ of operating at a deficit, which is illegal under state law.”<sup>47</sup>

The Eleventh Circuit ruled, in *Bailey v. Gulf Coast Transportation, Inc.*,<sup>48</sup> that Fair Labor Standards Act<sup>49</sup> remedies for violation of its anti-retaliation provision are greater than those recoverable for violations of the Act’s wage and overtime provisions.<sup>50</sup>

The Hollywood City Commission has come up with an innovative way of financing pay raises for police: allow thirty-one officers to retire early.<sup>51</sup> Instead of waiting twenty-five years to retire with full benefits, the proposal would allow the thirty-one eligible officers to retire sooner and receive a

40. *Id.*

41. *Id.*

42. *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 1221 (2002); Linda Greenhouse, *Despite Complaining About Pay, Justices Won’t Review a Ruling That Blocks Raises*, N.Y. TIMES, Mar. 5, 2002, at A21.

43. U.S. CONST. art. III, § 1.

44. Greenhouse, *supra* note 42.

45. Charles Savage, *Pay Cut for Dade School Workers*, MIAMI HERALD, May 23, 2002, at 1B.

46. *Id.*

47. *Id.*; FLA. STAT. § 129.07 (2001).

48. 280 F.3d 1333 (11th Cir. 2002).

49. 29 U.S.C. §§ 201–209 (2000).

50. *Bailey*, 280 F.3d at 1335; *see Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933–34 (11th Cir. 2000).

51. Elena Cabral, *Plan for Police Buyouts Would Help Pay for Raises*, MIAMI HERALD, Apr. 10, 2002, at 5B.

pension at once, so long as “they first pay into the pension fund the amount they would have paid by their 25th year.”<sup>52</sup>

## B. Benefits

### 1. Disability and Death Benefits

Florida law recognizes a legal presumption that fire fighters that develop heart disease, hypertension, or tuberculosis contracted it in the line of duty.<sup>53</sup> Disability benefits are more generous for impairments deemed to have occurred in the line of duty than those that are not considered to be job related.<sup>54</sup> Efforts to extend this legal presumption to police and corrections officers have met with resistance in light of its cost.<sup>55</sup>

On June 25, 2002, President Bush signed a bill, the Mychal Judge Act,<sup>56</sup> authorizing the extension of death benefits to domestic partners of firefighters and police officers that die in the line of duty.<sup>57</sup> The law allows a \$250,000 federal death benefit for police and fire officers’ survivors who are listed as beneficiaries on the decedents’ life insurance policies.<sup>58</sup> No longer will only spouses, children, and parents be eligible for such benefits. By contrast, only a spouse or child is entitled to death benefits of members of the military.<sup>59</sup>

### 2. Public Pensions

#### a. Public Pension Legislation

For the first time, “American workers now put more money into pension and retirement savings plans sponsored by their employers than the

52. *Id.*

53. FLA. STAT. § 112.18 (2001).

54. *See, e.g.*, VA. CODE ANN. § 51.1–812 (Michie 2002); MASS. GEN. LAWS ANN. Ch. 32, § 6(1) (West 2001); N.H. REV. STAT. ANN. § 100-A:6(I)(a) (Supp. 2002).

55. *Proposed Police Perk Draws Ire of City Leaders*, MIAMI HERALD, Apr. 13, 2002, at 3B.

56. Mychal Judge Police and Fire Chaplains Public Safety Officers’ Benefit Act of 2001, H.R. 3297, 107th Cong. (2002) (amending the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3796(b)).

57. Mike Allen, *U.S. Extends Death Benefits for Gay Cops, Firefighters*, MIAMI HERALD, June 26, 2002, at 1A.

58. *Id.*

59. *Id.*

companies themselves do.”<sup>60</sup> Traditionally, public pensions have followed the defined-benefit model in which the employer provides a fixed pension amount for eligible retirees.<sup>61</sup> But increasingly, public pensions are converting from defined-benefit plans to defined-contribution plans, similar to 401(k)s found in the private sector.<sup>62</sup>

Indeed, Florida adopted a new 401(k)-style retirement plan option in which state and local government employees can choose from among fifty investment options.<sup>63</sup> The Florida Legislature approved the new plan in the 2000 session.<sup>64</sup> The plan envisions converting “between \$8 billion and \$30 billion [of the state’s] \$96 billion pension [fund into] employee-controlled investment accounts.”<sup>65</sup> In 2002, all 650,000 public employees are choosing between staying with the traditional fixed-pension formula which guarantees a certain income or opting for the new defined contribution plan.<sup>66</sup> On November 20, 2001, the Florida Retirement System selected Prudential Financial, Fidelity Investments, and Nationwide Financial to administer 401(k)-like retirement plans for state and local public employees.<sup>67</sup>

#### b. *Public Pension Fund Investments*

The trustees of the Florida Retirement System approved a number of investment firms that will offer comprehensive investment services for state workers who opt to direct their own retirement portfolios.<sup>68</sup> The retirement plan for 650,000 public employees in Florida will, for the first time, be allowed to decide if they should shift from defined benefits plans that guarantee retirees a certain amount of money until death, to defined contribution plans where individual employees decide how to invest their pensions.<sup>69</sup>

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60. Edward Wyatt, *Pension Change Puts the Burden on the Worker*, N.Y. TIMES, Apr. 5, 2002, at 1A.

61. *Id.*

62. *Id.*

63. Joni F. James, *New State Retirement Plan May Include Market Option*, MIAMI HERALD, Nov. 15, 2001, at 1C.

64. *Id.*

65. *Id.*

66. *Id.*

67. John Dorschner, *Firms Picked for Pension Plan*, MIAMI HERALD, Nov. 21, 2001, at 3C.

68. John Dorschner, *Trustees Approve Four Firms for Pension Plan*, MIAMI HERALD, Nov. 28, 2001, at 3C.

69. James, *supra* note 63.

Several public pension plans with substantial holdings in Enron and WorldCom stock have sustained enormous losses as these corporations collapsed in 2002.<sup>70</sup> For example, Florida's public pension fund lost \$329 million, much of it from its now worthless Enron holdings.<sup>71</sup> In addition, Florida lost about \$92 million owing to its investments in WorldCom.<sup>72</sup> Moreover, Florida is pursuing "a lawsuit against a money management firm whose [hapless] Enron investments cost the fund \$281 million."<sup>73</sup>

Florida's Attorney General is probing whether Enron violated federal racketeering laws in connection with the state's public employee pension fund's \$306 million loss on Enron stock.<sup>74</sup> The state is also investigating Alliance Capital Management, the New York financial firm that bought 7.6 million Enron shares for the state pension fund, of which 2.7 million were purchased after an SEC investigation was launched.<sup>75</sup> An Alliance executive was also a board member of Enron.<sup>76</sup> Alliance was fired by the pension fund in December 2001.<sup>77</sup> The pension fund lost one third of one percent of its \$96 billion balance as a result of its holdings in Enron stock.<sup>78</sup>

### c. Taxation

The IRS has ruled that an employee is not taxed on deferred compensation payments transferred to an ex-spouse in divorce proceedings.<sup>79</sup>

### d. Double-Dipping

Double-dipping is the suspect practice of allowing retired public employees who are drawing a pension to go back to work in a public-paying job.<sup>80</sup> The City of Miami's pension laws prohibit this practice but a majority

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70. Joni James, *State Fund Takes Big Plunge in Value*, MIAMI HERALD, June 28, 2002, at 1C.

71. *Id.*

72. *Id.*

73. Joni James, *Pension Board Hires Two Law Firms to Consider Suit Over Enron Losses*, MIAMI HERALD, Apr. 10, 2002, at 9B.

74. Joni James, *Enron Under Scrutiny*, MIAMI HERALD, Jan. 18, 2002, at 1C.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. REV. RUL. 2002-22, 2002-19 I.R.B 849.

80. Editorial, *For Fiscal Responsibility Don't Change Pension Law*, MIAMI HERALD, June 13, 2002, at 6B.

of Miami's commissioners approved a measure that would allow managers with the city to engage in double-dipping. A *Miami Herald* editorial deplored the proposed tolerance of such a practice.<sup>81</sup> Somewhat inconsistently, the editorial tolerates double-dipping by retired firefighters and police officers.<sup>82</sup>

### 3. Privacy and Surveillance

Florida is a national leader in making public records open and accessible to its citizenry, but state legislators have enacted some exemptions for public school teachers.<sup>83</sup> For example, legislators voted to keep teachers' identities secret to protect records of their classroom performance in order to allow principals to assist teachers in improving their performance.<sup>84</sup> Moreover, public employees' addresses and phone numbers are confidential.<sup>85</sup>

On another privacy front, the federal courts issued guidelines for monitoring the Internet use of judges, striking language that said the country's 30,000 court employees enjoyed no right of privacy when they sent e-mail or surfed the Web.<sup>86</sup>

### 4. Health Benefits

Sixty-five percent of Americans have health insurance through their jobs.<sup>87</sup> COBRA, the Consolidated Omnibus Budget Reconciliation Act,<sup>88</sup> enables former employees to keep their health insurance through their ex-employers' group health plan.<sup>89</sup> But, COBRA coverage costs so much that only twenty percent of those eligible, 4.7 million people, chose COBRA coverage in 1999.<sup>90</sup> Instead, many jobless individuals forego healthcare

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81. *Id.*

82. *Id.*

83. Lesley Clark, *House Votes to Hide IDs of Schoolteachers*, MIAMI HERALD, Mar. 14, 2002, at 7B.

84. *Id.*

85. *Id.*

86. *Judges Ease Surveillance of Web Use*, N.Y. TIMES, Sept. 20, 2001, at A15.

87. Shannon Tan, *COBRA Helps Those Laid Off*, MIAMI HERALD, Nov. 7, 2001, at 1C.

88. Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, Pub. L. No. 99-272 (1986) (codified at 20 U.S.C. § 1091).

89. Tan, *supra* note 87.

90. *Id.*

coverage altogether.<sup>91</sup> To continue under a former employer's policy, eligible persons pay the whole premium and as much as two percent in overhead fees.<sup>92</sup> Florida offers "mini-COBRA" for some laid off workers who are ineligible for federal COBRA.<sup>93</sup> The Eleventh Circuit ruled, in *Wright v. Hanna Steel Corp.*,<sup>94</sup> that penalties under COBRA may be recoverable only by plan participants, not by plan beneficiaries.<sup>95</sup>

The medical privacy regulation, required by the Health Insurance Portability and Accountability Act (HIPAA),<sup>96</sup> affords federal protection while allowing states to enact tougher laws governing disclosure of patient medical information. A group of insurers have joined to analyze the fifty state privacy laws to aid employers in efforts to meet the HIPAA privacy regulation's deadline of April 14, 2003.<sup>97</sup>

### 5. Occupational Health and Safety Issues

The *South Florida Building Code* prescribes how fire walls between rooms should be constructed to shield building inhabitants in a fire.<sup>98</sup> A former Fort Lauderdale building inspector alleged, in a federal district court suit,<sup>99</sup> that the fire walls were improperly sealed, posing the risk of smoke inhalation to those inside.<sup>100</sup> The city, in turn, alleged that the inspectors forced contractors to use fire-retardant caulk to seal the fire walls, in violation of the building code.<sup>101</sup>

Florida law bans smoking inside all state correctional facilities except death row or employee housing.<sup>102</sup> Only outdoor smoking is allowed under state law.<sup>103</sup> A corrections department spokeswoman claims the ban on

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91. *Id.*

92. *Id.*

93. *Id.*

94. 270 F.3d 1336 (11th Cir. 2001).

95. *Id.* at 1343.

96. Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

97. 70 U.S.L.W. 28, p. 2457, Jan. 29, 2002.

98. BROWARD COUNTY, FLA., SOUTH FLORIDA BUILDING CODE § 3704 Table 37-B (1992).

99. *Wilkes v. City of Fort Lauderdale*, No. 01-CV-7372, (S.D. Fla. Aug. 17, 2001).

100. Brad Bennett, *Lauderdale Sued Over Fire-Safety Inspections*, MIAMI HERALD, Oct. 10, 2001, at 3B.

101. *Id.*

102. Monica Rhor, *Inmates Say Ban on Smoking Indoors Is Ignored*, MIAMI HERALD, Oct. 28, 2001, at 1BR.

103. FLA. STAT. § 944.115(3)(a) (2001).

indoor smoking is enforced.<sup>104</sup> Besides inmates, some guards also complain about indoor smoking.<sup>105</sup> So far, the state has refused to ban the sale of any tobacco products in correctional facilities.<sup>106</sup> Some prison officials argue that tolerating smoking in prison aided in controlling inmates and cut down on smuggling of cigarettes.<sup>107</sup> A 1993 United States Supreme Court ruling, however, makes clear that prisoners who can show second-hand smoke poses a health threat can sue.<sup>108</sup>

## 6. Family Medical Leave Act

On June 24, 2002, the United States Supreme Court agreed to hear an appeal filed by the State of Nevada that contests Congress' authority, pursuant to the Family and Medical Leave Act (FMLA),<sup>109</sup> to force states to accord public employees leave.<sup>110</sup> At issue is whether the Act should receive only minimal judicial scrutiny or heightened scrutiny because the Act is related to Congress' interest in rooting out sex discrimination.<sup>111</sup>

The Eleventh Circuit has ruled that the FMLA provision enabling "employees" to sue their employers includes former employees.<sup>112</sup>

Under a Department of Labor regulation,<sup>113</sup> "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."<sup>114</sup> On March 19, 2002, in a 5-4 opinion, the Supreme Court struck down this regulation, ruling that it incorrectly set up an irrebuttable presumption without requiring the employee to prove that he or she was prejudiced by the lack of notice.<sup>115</sup> The decision has been hailed as a victory for employer groups who claimed the regulation penalized employers for

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104. Rhor, *supra* note 102.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Family and Medical Leave Act (FMLA), 29 U.S.C.A. §§ 2601-19 (1999).

110. Hibbs v. Dep't of Human Res., 273 F.3d 844 (9th Cir. 2001).

111. Linda Greenhouse, *Justices Agree to Hear Major Federalism Case*, N.Y. TIMES, June 25, 2002, at A21.

112. Smith v. BellSouth Telecomm. Inc., 273 F.3d 1303 (11th Cir. 2001).

113. 29 C.F.R. § 825.700(a) (2000).

114. *Id.*

115. Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155, 1157 (2002).

bestowing benefits beyond those set out in federal law.<sup>116</sup> The case is the first ruling addressing the scope of the 1993 FMLA.<sup>117</sup>

### 7. Unemployment Benefits

In 2001, about forty-percent of unemployed Americans received benefits, down from fifty-five percent in the 1950s.<sup>118</sup> Moreover, the average level of benefits had declined and some states have enacted stricter eligibility rules.<sup>119</sup>

As part of the Job Creation and Worker Assistance Act of 2002,<sup>120</sup> federal funds will be distributed to the states to supplement unemployment benefit trust funds in the wake of September 11.<sup>121</sup> Eligible persons will receive an additional thirteen weeks of jobless benefits.<sup>122</sup>

According to Labor Department officials, about eight percent of the \$30 billion in unemployment benefits paid in 2001 were fraudulent claims or overpayments.<sup>123</sup> Almost 3000 claims were paid to people using Social Security numbers that did not exist or belonged to dead people.<sup>124</sup>

On November 13, 2001, the Department of Labor issued a new rule lifting eligibility restrictions for disaster unemployment assistance.<sup>125</sup>

## IV. DISCIPLINE AND DISCHARGE

### A. Retaliation

Federal anti-discrimination statutes enable public (and private) employees to sue their employers when employees are retaliated against for

116. Greg Stohr, *High Court Strikes Down Leave Penalty*, MIAMI HERALD, Mar. 20, 2002, at 1C.

117. *Id.*

118. David Leonhardt, *Georgia Finds Itself in Jobless Benefits Bind*, N.Y. TIMES, Jan. 16, 2002, Section A14.

119. *Id.*

120. Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (2002).

121. *See id.*

122. Shannon Tan, *Jobless Benefits Expanded*, MIAMI HERALD, Mar. 13, 2002, at 3C.

123. Leigh Strope, *Fraud Grows in Jobless Insurance System*, MIAMI HERALD, June 12, 2002, at 3C.

124. *Id.*

125. Employment and Training Administration, 66 Fed. Reg. 56,959 (Nov. 13, 2001) (to be codified at 20 C.F.R. pt. 625).

exercising any of their statutorily protected right.<sup>126</sup> The employee must prove that the employer took an adverse employment action against her because, for example, she filed a claim of sexual harassment.<sup>127</sup> The circuit courts are split over whether a reassignment constitutes an adverse employment action.<sup>128</sup> For example, the Eleventh Circuit affirmed, in *Barrios v. Florida Board of Regents*,<sup>129</sup> the trial court's holding that reassignment to another job with different hours and conditions of employment can amount to an adverse employment action for purposes of establishing a retaliation claim.<sup>130</sup>

### B. Whistle-Blowing

On April 30, 2002, the House of Representatives enacted the Notification and Federal Employee Anti-discrimination and Retaliation Act<sup>131</sup> that requires federal agencies to pay out of their own budgets any judgments against them in whistle-blower cases. The Senate enacted an amended version of the bill<sup>132</sup> which went to the President for his signature.

The First Circuit has ruled that states retain sovereign immunity from federal administrative proceedings invoked by state employees' federal whistle-blower protection statutes.<sup>133</sup>

### C. The First Amendment

A controversy arose after three firefighters removed the American flag from their fire truck four days after the terrorist attack.<sup>134</sup> While the three

126. 29 U.S.C. § 2615 (2002).

127. *Id.*

128. See e.g. *Cravens v. Blue Cross & Blue Shield*, 214 F.3d 1011 (8th Cir. 2000); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995).

129. 31 Fed. Appx. 932 (11th Cir. 2002) (unpublished opinion), *petition for cert. filed Apr. 16, 2002, cert. denied*, 122 S. Ct. 2621 (2002).

130. *Barrios v. Florida Bd. of Regents*, No. 00-CV-1995 (S.D. Fla. 2000).

131. Pub. L. No. 107-174, 116 Stat. 566 (2002).

132. H.R. Con. Res. 169, 107th Cong. (2002) *amended by S. AMDT. 3328* (signed by the President May 15, 2002).

133. *R.I. Dep't of Envtl. Mgmt. v. United States*, 286 F.3d 27 (1st Cir. 2002) (holding a state official is a person who may be sued in an individual capacity in a federal whistle-blower action) *withdrawn and superseded by* 2002 WL 1974389 at \*1 (1st Cir. Aug. 30, 2002).

134. Nicole White, *Firefighters Didn't Refuse to Fly Flag on Truck, Chief Says*, MIAMI HERALD, Oct. 26, 2001, at 1B.

firefighters regarded the flag as an emblem of oppression for African-Americans, they insisted that they removed the flag because it blocked their view.<sup>135</sup> Two of the firefighters who were out on administrative leave with pay, were cleared to return to work after an investigation.<sup>136</sup> Two days after the incident, the fire department ordered all trucks to display the American flags. The three firefighters expressed concerns about their safety after several firefighters said they would refuse to back them up in a fire.<sup>137</sup>

Does a public school teacher have a first amendment right to appear in an online pornographic video? The Broward County School Board voted to suspend without pay an elementary school physical education teacher whose appearance in a pornographic movie prompted complaints by educators and parents.<sup>138</sup> Some parents have urged the Broward County School Board to fire him and seek revocation of his teaching license.<sup>139</sup> The complaint against the teacher specifically alleges that his actions have publicly disgraced the education profession as a whole and violated the school board's policies.<sup>140</sup> In response, the teacher's attorney plans to appeal the suspension, claiming his client has done "absolutely nothing illegal or criminal."<sup>141</sup> An informal poll of high school students was taken and a majority said they would feel uneasy around the teacher.<sup>142</sup>

In *McKinley v. Kaplan*,<sup>143</sup> a former member of a Miami-Dade County Film Board alleged that she was dismissed from her post in retaliation for a public statement she made about a controversial county policy.<sup>144</sup> The Eleventh Circuit affirmed the district court's grant of summary judgment to the county, concluding that plaintiff's removal from her at-will appointed position did not constitute a violation of her free speech rights under the First Amendment.<sup>145</sup> In coming to this conclusion, the court applied the four-part First Amendment retaliation test, assumed her speech touched on a matter of public concern, and focused on the balancing part of the *Pickering*

135. *Id.*

136. *Id.*

137. *Id.*

138. Sonji Jacobs, *Board Suspends Teacher in Video: Online Porn Film "Crossed the Line,"* MIAMI HERALD, June 19, 2002, at 1B.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. 262 F.3d 1146 (11th Cir. 2001).

144. *Id.* at 1147.

145. *Id.*

test.<sup>146</sup> Relying on the public employer's need to trust policy-making employees, the court ruled that the plaintiff's First Amendment right was outweighed by the county's interest.<sup>147</sup>

In *Mason v. Village of El Portal*,<sup>148</sup> a chief of police claimed that he was not reappointed in retaliation for speaking out at a public safety commission meeting about the commission's undue emphasis on gender and race in discussing the replacement of a black police officer who had resigned.<sup>149</sup> The Eleventh Circuit addressed only the third part of the First Amendment retaliation test: whether the employee's speech played a substantial part in the employer's decision not to reappoint him.<sup>150</sup> In light of the evidence that a majority of the council who voted not to reappoint the chief did not even know of his controversial comments, the court concluded that the vote not to reappoint the chief could not have resulted from those statements.<sup>151</sup>

In *Littleford v. Department of Highway Safety & Motor Vehicles*,<sup>152</sup> a Florida Highway Patrol supervisor was fired for a string of incidents of "verbal abuse, profanity, use of racist or sexist epithets and one incident of making a false statement under oath during the investigation."<sup>153</sup> On appeal from the Public Employees Relations Commission order sustaining Littleford's dismissal, the Fifth District Court of Appeal ruled that Littleford was not injured by the Commission's failure to follow its own rules and procedures in disciplining him.<sup>154</sup>

In *Stueber v. Gallagher*,<sup>155</sup> a public high school art teacher appealed the revocation of his teaching license on grounds that the Education Practices Commission deprived him of his right to due process of law by allowing the commission to raise claims not found in the complaint.<sup>156</sup> At the administrative hearing, the teacher admitted that he accessed pornography on his school computer (but denied accessing teenage pornography) and that he had battered his wife.<sup>157</sup> The district court refused to reverse the revocation of

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146. *Id.* at 1150 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

147. *Id.*

148. 240 F.3d 1337 (11th Cir. 2001).

149. *Id.* at 1338-39.

150. *Id.* at 1339.

151. *Id.* at 1340.

152. 814 So. 2d 1258 (Fla. 5th Dist. Ct. App. 2002).

153. *Id.* at 1259.

154. *Id.*

155. 812 So. 2d 454 (Fla. 5th Dist. Ct. App. 2002).

156. *Id.* at 456.

157. *Id.*

the teacher's license since the teacher failed to preserve his rights when he failed to properly object to the presentation of evidence by the Commissioner of Education during the informal hearing.<sup>158</sup>

A former Fort Lauderdale building inspector alleged in a federal suit that the city threatened him with disciplinary action after he insisted that contractors use fire-retardant caulk to seal fire walls.<sup>159</sup> The inspector, who sought back pay and other damages, claimed that the city violated his First Amendment right to free speech because it barred him from properly enforcing the building code.<sup>160</sup>

The various circuit courts have applied three different tests in assessing the free speech rights of public school teachers over classroom speech.<sup>161</sup> An Iranian medical technician at the University of Miami lost his job over remarking on his birthday, September 11, "[s]ome birthday gift from Osama bin Laden!"<sup>162</sup>

#### D. *Employment Discrimination*

##### 1. Generally

Many employers have purchased insurance policies to cover employment discrimination claims.<sup>163</sup> But with the increase in damages assessed by juries (twenty-percent are for \$1 million or higher), insurers are doubling or tripling their rates.<sup>164</sup> Liability insurance for employment practices became popular after Congress passed the Civil Rights Act of 1991,<sup>165</sup> which made

158. *Id.* at 456–57.

159. Brad Bennett, *Lauderdale Sued Over Fire Safety Inspections*, MIAMI HERALD, Oct. 10, 2001, at 3B.

160. *Id.*

161. *E.g.*, *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001) (noting, without deciding, the issue); *Vega v. Miller*, 273 F.3d 460 (2d Cir. 2001) (asking if there are content-based differences under the First Amendment between academic speech involving political matters and academic speech involving other matters); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001) (applying *Pickering* balancing test while noting that some circuits apply the reasoning from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)).

162. Gail Epstein Nieves, *UM Employee Lost His Job For Remarks on September 11*, MIAMI HERALD, Nov. 16, 2001, at 1A.

163. Reed Abelson, *Surge in Bias Cases Punishes Insurers, and Premiums Rise*, N.Y. TIMES, Jan. 9, 2002, at C1.

164. *Id.*

165. Pub. L. 102-166, as enacted on Nov. 21, 1991 (amending 42 U.S.C. § 1981).

jury trials and punitive damages available.<sup>166</sup> As a general rule, however, employers may not insure against punitive damages. While the number of claims made annually to the Equal Employment Opportunity Commission (EEOC) has not risen, awards in settlements, and mediation have climbed two-thirds over three years.<sup>167</sup>

The Supreme Court, in *EEOC v. Waffle House, Inc.*,<sup>168</sup> ruled that the EEOC, the federal agency charged with eliminating job discrimination, can sue for damages on behalf of workers who have agreed to resolve all on-the-job disputes by arbitration.<sup>169</sup> Since the EEOC was not a party to the arbitration agreement, the high court ruled the EEOC is not bound by the arbitration agreement.<sup>170</sup> The EEOC has an independent mandate to pursue lawsuits that serve the public's interest.<sup>171</sup>

On March 19, 2002, the Supreme Court ruled, in *Edelman v. Lynchburg College*,<sup>172</sup> that an EEOC regulation enabling a plaintiff to "verify" at a future date an unsworn discrimination charge that was timely filed was permissible.<sup>173</sup> Under section 706(e)(1) of Title VII of the *United States Code*,<sup>174</sup> discrimination charges must be filed within 180 days of the alleged injury or within 300 days in a deferral state that has an agreement with the EEOC to handle such claims.<sup>175</sup> But the Supreme Court ruled that a claimant may "verify" by oath after the filing deadline an unsworn charge filed before the deadline.<sup>176</sup>

The Supreme Court ruled, in *Swierkiewicz v. Sorema N.A.*,<sup>177</sup> that, in order to survive a motion to dismiss, a complaint alleging employment discrimination, need not spell out specific facts which proves a prima facie case in order to survive a motion to dismiss.<sup>178</sup> Under *McDonnell Douglas Corp. v. Green*,<sup>179</sup> a complaint need only set out a "short and plain statement

166. *Id.*

167. Abelson, *supra* note 163.

168. 122 S. Ct. 754 (2002).

169. Anne Gearan, *EEOC Can Sue When Worker Can't*, *Court Rules*, *MIAMI HERALD*, Jan. 16, 2002, at 4C.

170. *Waffle House, Inc.*, 122 S. Ct. at 761-62.

171. *Id.* at 764.

172. 122 S. Ct. 1145 (2002).

173. *Id.* at 1147.

174. 42 U.S.C. § 2000e-5(e)(1) (2000).

175. *Id.*

176. *Edelman*, 122 S. Ct. at 1152-53.

177. 122 S. Ct. 992 (2002).

178. *Id.* at 998.

179. 411 U.S. 792 (1973).

of the claim.”<sup>180</sup> The Supreme Court has also ruled that illegal aliens who have been discriminated against under federal labor law may not recover back pay.<sup>181</sup>

## 2. Race

The relationship between white administrators for the City of Fort Lauderdale and its black employees has continued to deteriorate over the past year.<sup>182</sup> The city attorney has been accused, by black community leaders, of illegally keeping separate personnel files.<sup>183</sup> According to critics, this enables the city to hide *smoking gun* information on white administrators who may be accused of discrimination.<sup>184</sup>

## 3. Gender

In *Danskine v. Miami Dade Fire Department*,<sup>185</sup> a county fire department’s affirmative action program was challenged both under equal protection and Title VII.<sup>186</sup> The program aimed to hiring more female firefighters during the 1994-97 period, specifically thirty-six percent females for entry-level posts.<sup>187</sup> In rejecting the equal protection claims of male applicants, the Eleventh Circuit concluded that the plan was substantially related to the interest in remedying the after effects of earlier unlawful discrimination.<sup>188</sup> Moreover, the thirty-six percent goal did not amount to an inflexible quota.<sup>189</sup> Finally, plaintiffs could not establish any injury.<sup>190</sup>

On June 10, 2002, the Supreme Court ruled, in *National Railroad Passenger Corp. v. Morgan*,<sup>191</sup> that an employee who raises a hostile work

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180. *Swierkiewicz*, 122 S. Ct. at 994 (quoting FED. R. CIV. P. 8(a)(2)).

181. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 122 S. Ct. 1275 (2002).

182. *See Brad Bennett, Activists Push City Attorney to Resign*, MIAMI HERALD, Oct. 24, 2001, at 3B.

183. *Id.*

184. *Id.*

185. 253 F.3d 1288 (11th Cir. 2001).

186. *Id.* at 1289.

187. *Id.* at 1295.

188. *Id.* at 1294.

189. *Id.* at 1295.

190. *Danskine*, 253 F.3d at 1295.

191. 122 S. Ct. 2061 (2002).

environment claim under Title VII may recover for the whole term of hostile environment as long as one act takes place within the filing period.<sup>192</sup>

In *Miles v. Florida A&M University*,<sup>193</sup> a state university dismissed the general manager of the radio station for allegedly harassing female students more than sixty days after some of the abuse allegedly took place.<sup>194</sup> Mr. Miles sought a formal administrative hearing under Florida law.<sup>195</sup> After a formal evidentiary hearing, Mr. Miles' dismissal was upheld.<sup>196</sup> On appeal, the court ruled that the administrative law judge's findings were supported by the weight of the evidence.<sup>197</sup> The court concluded the sixty-day filing limit in no way prohibited the University from investigating complaints filed later.<sup>198</sup>

#### 4. Age Discrimination

The EEOC has changed its view that employee benefit plans, that stop or reduce benefits once a retiree becomes eligible for Medicare, violate the ADEA.<sup>199</sup> The EEOC will no longer challenge these *Medicare bridge* cases.<sup>200</sup>

On September 13, 2001, the Senate Health, Education, Labor, and Pensions Committee voted 12-9 to approve the Older Workers Rights Restoration Act of 2001.<sup>201</sup> This amendment requires states receiving federal funding to waive its immunity against ADEA lawsuits brought by state employees.<sup>202</sup>

The Supreme Court ultimately decided not to rule on whether the federal age discrimination law allows "disparate impact" suits, an issue that has split lower federal courts.<sup>203</sup> The Supreme Court would have reviewed

192. *Id.* at 2076.

193. 813 So. 2d 242 (Fla. 1st Dist. Ct. App. 2002).

194. *Id.* at 244-45.

195. *Id.* at 244; FLA. STAT. § 120.57(1) (2001).

196. *Miles*, 813 So. 2d at 244.

197. *Id.*

198. *Id.* at 245.

199. *Rescission of Section IV(B) of EEOC Compliance Manual Chapter on "Employee Benefits" and Deletion of Example*, <http://www.eeoc.gov/docs/benefits-rescind.html> (Aug. 20, 2001).

200. *Id.*

201. S. 928, 107th Cong. (2002) (amending 29 U.S.C. 621 et seq.).

202. *Id.*

203. *Adams v. Fla. Power Corp.*, 122 S. Ct. 1290 (2002) (affirming *Adams v. Fla. Power Corp.*, 255 F.3d 1322 (11th Cir. 2001)).

claims by former Florida Power Corporation employees that the company committed age discrimination when seventy percent of those let go during company reorganizations were age forty or older.<sup>204</sup> Previously, the Eleventh Circuit ruled out the disparate impact framework under the ADEA.<sup>205</sup>

## 5. Disability

The Supreme Court ruled on June 17, 2002, in *Barnes v. Gorman*,<sup>206</sup> that punitive damages are not recoverable against a municipal government under section 504 of the Rehabilitation Act of 1973<sup>207</sup> or section 202 of the Americans with Disabilities Act of 1990.<sup>208</sup>

In *US Airways, Inc. v. Barnett*,<sup>209</sup> the Supreme Court ruled that if reassignment to accommodate a disabled employee would violate an established seniority system, then that reassignment is not a reasonable accommodation.<sup>210</sup>

In *Chevron U.S.A. Inc. v. Echazabal*,<sup>211</sup> the Supreme Court ruled that the ADA does not force employers to hire individuals whose own health or safety would be placed at risk by the job.<sup>212</sup> In that case, a refinery employee suffered from a liver disease that rendered it hazardous for him to continue laboring in a chemical-laden environment.<sup>213</sup>

In January, 2002, the Supreme Court unanimously ruled, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>214</sup> that a worker's inability to perform manual tasks substantially limits a major life activity only if the impairment prevents the worker from performing tasks of central importance to daily life.<sup>215</sup> This case is one of several this year in which the Supreme Court has made it harder than the ADA's advocates envisioned for plaintiffs

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204. Anne Gearan, *Court to Rule on Age Bias*, MIAMI HERALD, Dec. 4, 2001, at 7A.

205. *Adams v. Fla. Power Corp.*, 255 F.3d 1322 (11th Cir. 2001).

206. 122 S. Ct. 2097, 2103 (2002).

207. Nondiscrimination Under Federal Grants and Programs Act, 29 U.S.C. § 794 (2000).

208. 42 U.S.C. § 12132 (2000).

209. 122 S. Ct. 1516 (2002).

210. *Id.* at 1524–25.

211. 122 S. Ct. 2045 (2002).

212. *Id.* at 2047.

213. *Id.* at 2048.

214. 534 U.S. 184 (2002).

215. *Id.* at 198.

to prevail, or even to make it into court at all under narrower definitions of disability.<sup>216</sup>

The Eleventh Circuit, in *Johnson v. K Mart Corp.*,<sup>217</sup> reversed one of its earlier decisions<sup>218</sup> and ruled that Title I of the ADA permits a former employee to sue for post-employment benefits.<sup>219</sup> In *Johnson*, the court ruled that a disability plan violates the ADA when it grants fewer benefits for mentally disabled employees than for physically disabled employees.<sup>220</sup>

In *Chenoweth v. Hillsborough County*,<sup>221</sup> the Eleventh Circuit ruled that an inability to drive to work does not substantially limit the major life activity of working.<sup>222</sup> Therefore, the plaintiff was unable to establish a prima facie case of disability discrimination.<sup>223</sup>

In *Waddell v. Valley Forge Dental Associates Inc.*,<sup>224</sup> the Eleventh Circuit ruled that a dental hygienist, who was HIV-positive, posed a direct threat to others owing to the substantial risk of transmission.<sup>225</sup> At least facially, this decision seems at odds with the Supreme Court decision in *Bragdon v. Abbott*<sup>226</sup> which held individuals who are HIV-positive are protected under the ADA.<sup>227</sup>

In *Olmstead v. Walter Industries Inc.*,<sup>228</sup> the Eleventh Circuit affirmed the Middle District of Florida's order that dismissed an employee's claim that that held it is not a reasonable accommodation for a disabled worker to insist upon an indefinite leave of absence.<sup>229</sup>

216. Linda Greenhouse, *Justices Narrow Breadth of Law on Disabilities*, N.Y. TIMES, Jan. 9, 2002, at A1.

217. 273 F.3d 1035 (11th Cir. 2001). The opinion was originally vacated and a rehearing en banc was granted on December 19, 2001, but the court stayed all proceedings when K Mart filed for Chapter 11 bankruptcy protection. *Johnson v. K Mart Corp.*, 281 F.3d 1368 (11th Cir. 2002).

218. *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523 (11th Cir. 1996).

219. *Johnson*, 273 F.3d at 1048.

220. *Id.* at 1059.

221. 250 F.3d 1328 (11th Cir. 2001).

222. *Id.* at 1329.

223. *Id.* at 1330.

224. 276 F.3d 1275 (11th Cir. 2001) for petition for cert. filed March 20, 2002.

225. *Id.* at 1284.

226. 524 U.S. 624 (1998).

227. *Id.* at 631.

228. 275 F.3d 1087 (11th Cir. 2001) (unpublished table opinion).

229. See generally *id.* (affirming *Olmstead v. Walter Indus., Inc.*, No. 99 Civ. 746 (M.D. Fla. Feb. 26, 2001)).

The EEOC asserts that employers may select any effective accommodation and need not be limited to the most effective accommodation option.<sup>230</sup>

In Florida, any Highway Patrol Trooper who is more than fifteen pounds over the department's weight limit is ineligible for a five hundred dollar performance bonus.<sup>231</sup>

## 6. Religion

The Pentagon reversed itself and decided to no longer require female service members in Saudi Arabia to wear a traditional veil while off the military base.<sup>232</sup> Even so, the new rule recommends the use of the veil to avoid offending Muslims.<sup>233</sup>

Even though employees are entitled to the free exercise of their religion at work, there are limits to what an employer must put up with.<sup>234</sup> For example, an employer will not violate federal law if the company terminates the employment of a worker who insists on proselytizing at work.<sup>235</sup> While religious employees can discuss their religious beliefs at work, an employer may legitimately impose discipline when talk turns into harassment.<sup>236</sup>

A Palestinian professor at the University of South Florida is challenging his dismissal over his purported terrorist associations.<sup>237</sup> The University regards the professor as a security risk and also believes his controversial views have cost the University financial support.<sup>238</sup>

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230. EEOC Advisory Letter, 70 U.S.L.W. 2432 (Jan. 22, 2002).

231. Phil Long, *Plump Cop Not a Good Cop? No Bonus for Heavy Troopers*, MIAMI HERALD, Apr. 15, 2002, at 1A.

232. *Pentagon Drops Veil Rule for Saudi, Arabia*, N.Y. TIMES, Jan. 23, 2002, at A15.

233. *Id.*

234. *Tennessee: Suit Says Company Discouraged Religion*. N.Y. TIMES, May 4, 2002, at A10. The Equal Employment Opportunity Commission has dismissed nine grievances filed by current and former workers of the Whirlpool plant in La Vergne, Tennessee. *Id.* The workers had filed federal lawsuits against the company, claiming that supervisors followed them into restrooms to see if the workers were praying after warning them not to pray on breaks. *Id.*

235. Adrienne P. Samuels, *Jury Rejects Bias Suit by Born-again Christian*, MIAMI HERALD, Feb. 9, 2002, at 3B.

236. *Id.*

237. Vickie Chachere, *USF Professor Fighting Dismissal*, MIAMI HERALD, Jan. 15, 2002, at 5B.

238. *Id.*

### E. *Procedural Due Process*

In *Cannon v. City of West Palm Beach*,<sup>239</sup> the Eleventh Circuit addressed the denial of a promotion of a firefighter who claimed he was stigmatized by a letter of reprimand placed in his personnel file.<sup>240</sup> The firefighter claimed he was deprived of a liberty interest without due process of law.<sup>241</sup> The court applied the “stigma-plus” test,<sup>242</sup> in which plaintiff “must establish the fact of the defamation ‘plus’ the violation of some more tangible interest before [he] is entitled to the procedural protections of the Due Process Clause.”<sup>243</sup> The court concluded that absent a discharge, injury to reputation, alone, is not a protected liberty interest.<sup>244</sup>

In *Jones v. Miami-Dade County, Public Schools*,<sup>245</sup> Mr. Jones was employed as a school principal for a one-year-at-a-time basis using annual employment contracts.<sup>246</sup> In June 2001, Mr. Jones learned he would not secure another annual contract as principal, but was entitled to re-employment as a teacher.<sup>247</sup> Mr. Jones sued, alleging that he had a property interest under the Due Process Clause that entitled him to notice and an opportunity to be heard.<sup>248</sup> The court rejected these due process claims, concluding that there was no entitlement to continued employment beyond the contract year.<sup>249</sup>

### F. *Remedies for Wrongful Discharge*

The ABA’s ethics committee has ruled that it is not unethical for a former in-house corporate counsel to bring a wrongful discharge claim against his former employer provided the attorney does not disclose more client information than necessary to prove his claim.<sup>250</sup>

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239. 250 F.3d 1299 (11th Cir. 2001).

240. *Id.* at 1300–01.

241. *Id.* at 1301.

242. *Id.* at 1302 (citing *Paul v. Davis*, 424 U.S. 693, 701–02 (1976)).

243. *Id.*

244. *Cannon*, 250 F.3d at 1303.

245. 816 So. 2d 824 (Fla. 3d Dist. Ct. App. 2002).

246. *Id.* at 824.

247. *Id.* at 825.

248. *Id.*

249. *Id.* at 826.

250. ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 01-424 (2001).

### G. Section 1983 Claims

The Eleventh Circuit ruled, in *Griffin v. City of Opa Locka*,<sup>251</sup> that a city manager acted under “color of state law” when he raped a female subordinate in her apartment.<sup>252</sup>

In *Wilson v. Clay County, Florida, School Board*,<sup>253</sup> the Eleventh Circuit ruled that legislative immunity does not protect a school board from a former employee’s Section 1983 claim.<sup>254</sup>

### H. Illegal Workers’ Remedies

The Supreme Court ruled, in a 5-4 decision, that undocumented aliens, who are victims of discrimination at the workplace, are not entitled to back pay.<sup>255</sup> This ruling affects seven million illegal employees who have jobs in the United States.<sup>256</sup>

## V. PUBLIC SECTOR UNIONS AND ARBITRATION

### A. Public Unions

According to the Bureau of Labor Statistics, thirty-seven percent of government employees were union members in 2001.<sup>257</sup>

Florida law prohibits anyone from giving or taking political contributions in government buildings.<sup>258</sup> What remains in dispute, however, is whether payroll deductions to pay union dues violates this ban when a portion of these dues are used for political purposes.<sup>259</sup>

251. 261 F.3d 1295 (11th Cir. 2001), *cert. denied*, 122 U.S. 1789 (2002).

252. *Id.* at 1303.

253. *Wilson v. Clay County Sch. Bd.*, No. 98-01080-CV-J-20C, 2001 WL 1690240 at \*1 (11th Cir. Nov. 21, 2001).

254. *Id.*

255. *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275, 1282 (2002).

256. Gina Holland, *Illegal Workers Not Owed Restitution*, MIAMI HERALD, Mar. 28, 2002, at 23A.

257. Steven Greenhouse, *Roll of Union Workers Is Steady*, N.Y. TIMES, Jan. 18, 2002, at A17.

258. FLA. STAT. § 106.15(4) (2001).

259. Steve Harrison, *Schools at Risk Over Union Dues*, MIAMI HERALD, Aug. 18, 2001, at 2B.

By executive order, citing national security concerns, President Bush prohibited union representation at the United States Attorneys' office, and at four other agencies in the Justice Department.<sup>260</sup>

### B. Arbitration

On January 15, 2002, the United States Supreme Court settled this split in authority, in *EEOC v. Waffle House, Inc.*<sup>261</sup> In *Waffle House, Inc.*, the Court ruled that a contract between an employee and employer to arbitrate all employment-based conflicts did not bar the EEOC, relying on statutory authority, from suing for injunctive and other relief, including back pay, reinstatement, and damages, under the Americans with Disabilities Act.<sup>262</sup>

The circuit courts are split over who should decide whether an arbitration clause is invalid. The Seventh,<sup>263</sup> Eighth,<sup>264</sup> and Eleventh<sup>265</sup> Circuits have ruled that the court should determine whether the clause is invalid. The Third<sup>266</sup> and Ninth<sup>267</sup> Circuits take the view that the court is entitled to determine whether the contract is void, but the arbitrator should decide whether the clause is voidable. Finally, the Sixth Circuit maintains that the district court should decide both questions.<sup>268</sup>

An arbitration agreement requiring the parties to share arbitration costs and fees equally may violate the employee's right to seek a complete awards of fees and costs under Title VII.<sup>269</sup>

## VI. CONCLUSION

Public sector employment and labor law covers considerable ground. Every stage of employment, from hiring, to the terms of employment, to employment discrimination, to discipline and discharge, gives rise to its own array of issues at the federal, state, and local levels. Post retirement also

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260. Steven Greenhouse, *Bush, Citing Security, Bans Some Unions at Justice Dept.*, N.Y. TIMES, Jan. 16, 2002, at A14.

261. 122 S. Ct. 754 (2002).

262. *Id.* at 760.

263. *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838 (7th Cir. 1999).

264. *Barker v. Golf U.S.A., Inc.* 154 F.3d 788 (8th Cir. 1998).

265. *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002).

266. *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000).

267. *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991).

268. *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001).

269. *Flyer Printing Co. v. Hill*, 805 So. 2d 829, 833 (Fla. 2d Dist. Ct. App. 2001).

**covers such issues as public pensions, disability retirement, and death benefits. Finally, September 11 has also left its imprint on employment law ranging from stepped up background checks for many public employees, to prolonged unemployment benefits for those affected by the terrorist attacks.**