

Nova Law Review

Volume 26, Issue 1

2001

Article 6

Public Employment Law

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2001 Survey of Florida Public Employment Law

John Sanchez*

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I. INTRODUCTION

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This article spans the several stages of public employment, beginning with the law governing the hiring of employees. Part II surveys current issues arising out of residency requirements for public employees; how privatization, also known as “outsourcing,” a process high on Governor Jeb Bush’s list of priorities, is fundamentally changing the nature of public employment; how Florida voters rejected a bid to change electing trial judges to appointment; how the teacher shortage is playing out in public schools; how cities and counties face liability if they fail to check the criminal background of applicants; how the police department has come up

with a novel way of recruiting police officers; how some public employees have been caught cheating on hiring exams and finally, Part II closes with a brief discussion of issues related to promotions.

Part III looks at the law governing the terms of public employment. This Part opens with a series of new developments on the hours and wages of public employees. The lion's share of Part III is devoted to current issues involving employee benefits, ranging from health benefits to public pensions; from disability and death benefits to occupational safety and health issues.

Part IV explores the wide array of legal issues surrounding the disciplining and discharging of public employees. While it is harder to dismiss an employee for off-duty misconduct than for on-the-job wrongdoing, both categories are addressed. Public employers must address the claims of whistle-blowers who report public misconduct to ensure that any sanction meted out is not in retaliation for expressing a view protected, for example, by the First Amendment. Part IV also looks at federal and state anti-discrimination laws that safeguard public employees from becoming targeted on grounds of race, gender, age, disability, or sexual orientation. A brief section touches on reductions-in-force, downsizing that becomes necessary when budgets are squeezed. Finally, Part IV addresses issues arising from the array of remedies public employees may recover in the event they prevail in court: damages, attorneys' fees and costs.

Part V surveys public sector collective bargaining issues, such as current issues involving public unions, the types of impasses unions and public employers face as they bargain in good faith over the terms and conditions of employment, and finally, Part V looks at a recent Supreme Court ruling that may result in more employment-related cases going to arbitration rather than to courts.

II. HIRING, RETENTION, AND PROMOTION

A. *Residency*

Former prosecutor Gina Mendez was removed from the Miami-Dade ballot because she lives in Pembroke Pines.¹ Miami-Dade judge Teri-Ann Miller was removed from the Broward ballot for failing to comply with residency rules.²

1. Larry Lebowitz & Jay Weaver, *Miller Files Ballot Lawsuit*, *MIAMI HERALD*, Sept. 12, 2000, at 1B.

2. *Id.*

Florida law requires school board members to live in the voter district when they file to run for a school board seat.³ One candidate for a District Seven seat in Miami-Dade allegedly registered to vote in District Six.⁴ Under state law, a rival, or some other District Seven resident must challenge a candidate's qualifications before a court can rule.⁵ Later, the candidate who claimed to live in a metal tool shed was ousted from the ballot.⁶

B. Privatization

Florida has become a leader in the movement to privatize governmental agencies. For example, in the last year Governor Bush pressured state agencies to shed 1800 state jobs in order to privatize posts ranging from janitors to food service.⁷ The move toward privatizing state jobs is fueled by the Governor's belief that "government can deliver high quality services with greater efficiency and lower costs."⁸ Grass cutting and cabin maintenance at state parks are also marked for privatization despite criticism about such "piecemeal privatization."⁹ The Department of Corrections and Transportation have likewise slated hundreds of positions for privatization.¹⁰

The state entered into a twenty year, \$700 million contract that privatizes a statewide police radio system.¹¹ "No other state has privatized its police radio system."¹² The old radio system was so old, parts had to be ordered from Russia.¹³

In a move that reverses teacher unions' hostility toward privatization, a Miami Dade public school teachers' union forged a partnership with New York-based Edison Schools to run ten charter schools in Miami-Dade.¹⁴

3. Analisa Nazareno, *Residence an Issue in Dade Schools Race*, MIAMI HERALD, July 25, 2000, at 7B.

4. *Id.*

5. *Id.*

6. *Residence Requirement*, N.Y. TIMES (Miami), Nov. 5, 2000, § 1, at 40.

7. Lesley Clark & Steve Bousquet, *State Agencies Tab 1800 Jobs for Elimination*, MIAMI HERALD, Sept. 16, 2000, at 9B.

8. *Id.*

9. *Id.*

10. *Id.*

11. Phil Long, *Two Companies Battling for State's Police Radio System*, MIAMI HERALD, Sept. 24, 2000, at 6B.

12. *Id.*

13. Phil Long, *Communications Network Has a Checkered History*, MIAMI HERALD, Sept. 24, 2000, at 6B.

14. Analisa Nazareno, *Dade Teachers' Union Enters Deal to Run 10 Charter Schools*, MIAMI HERALD, Sept. 8, 2000, at 7B.

Traditionally, teachers' unions have opposed charter schools, claiming they divert money from public schools, leaving the system weakened.¹⁵

National polls make clear that most voters oppose privatization especially when it comes to "more-complex services such as law enforcement, health inspections, fire protection, child support, nursing-home care, environmental protection and unemployment benefits."¹⁶

The Miami-Dade County Commission enacted an ordinance that will privatize the new building inspection procedure.¹⁷ The move has been criticized on grounds that private inspectors would be selected by the owners and developers of the projects under scrutiny.¹⁸

Governor Jeb Bush's move to privatize the care of ill veterans came under attack from some of Florida's 1.7 million veterans.¹⁹ The initiative is part of Bush's goal of reducing government by twenty five percent over the next five years.²⁰ What remains unclear is how a private firm can achieve better care than the state while also turning a profit. One lawmaker warned that so called "outsourcing" (i.e. privatization) removes civil service protections that make it harder to discipline or dismiss an unfit worker.²¹

C. Selection of Trial Judges; Hiring Senior Judges

Fort Lauderdale's attorney asked the Florida Attorney General's office to issue an opinion about the constitutionality of Broward's reliance on senior judges from other counties.²² Questions were raised over whether this practice deprives voters of the right to a trial in front of a locally elected jurist.²³

A measure on the November 2000 ballot that would have replaced elections for Florida trial court judges with an appointive system was

15. *Id.*

16. James Fendrich, *Privatization Costs Floridians Millions of Dollars*, MIAMI HERALD, May 4, 2001, at 13B.

17. Robert Steinback, *Privatizing Inspections: Promise and Peril*, MIAMI HERALD, July 18, 2001, at 3B.

18. *Id.*

19. Steve Bousquet, *Veterans Blast Bush Plan to Privatize*, MIAMI HERALD, Jan. 29, 2001, at 1A.

20. *Id.*

21. *Id.*

22. Sue Reisinger, *Ruling on Senior Judges Delayed*, MIAMI HERALD, Aug. 15, 2000, at 3B.

23. *Id.*

defeated by wide margins in every county.²⁴ The outcome was touted as a signal victory for Hispanic, black and female lawyers who have secured more slots on the bench in recent elections.²⁵

D. Teacher Shortage

In light of Florida's need to hire over 162,000 new teachers in the next decade, the state legislature considered a bill that would allot \$200 million annually for three years to raise teacher salaries.²⁶ The average teacher's pay in Florida is \$35,916, about \$5000 below the national average.²⁷ Along with an impending teacher shortage, the Broward County school district also faces a shortage of substitute teachers.²⁸ Apparently, "low pay, a lack of respect and the strong economy" make the job unattractive.²⁹ Substitute teachers must pass a state and federal background check and have earned 60 hours of college credit.³⁰ In Broward County, substitutes earn \$9.60 an hour; "permanent substitutes" earn \$12 an hour but receive no health benefits.³¹

Governor Jeb Bush has proposed a \$51 million teacher recruitment and retention plan.³² Under this program, first-time teachers in Florida public schools receive a \$1000 signing bonus.³³

State law requires school districts to hire new teachers for the next school year by May.³⁴ In light of this deadline, Broward's school district had a March 1 deadline on replacing interim substitutes with full-time-certified teachers.³⁵ But pressure from the teacher shortage led the district to eliminate the March 1 deadline.³⁶ In response, the teachers union claims the

24. William Glaberson, *States Taking Steps to Rein in Excesses of Judicial Politicking*, N.Y. TIMES (Miami), June 15, 2001, at A1.

25. Jay Weaver, *County Voters Reject Bid to Allow Governor to Appoint Trial Judges*, MIAMI HERALD, Nov. 8, 2000, at 14B.

26. *Teacher Shortage*, MIAMI HERALD, Mar. 21, 2001, at 12B.

27. *Id.*

28. Susan Ferrechio, *Shortage of "Subs" Troubling Schools*, MIAMI HERALD, Jan. 21, 2001, at 1BR.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Governor Bush in Miami Plugging Teacher Retention Plan*, MIAMI HERALD, Apr. 3, 2001, at 7B.

33. *Id.*

34. Jason Grotto, *Substitute Teachers Rule Upsets Some*, MIAMI HERALD, Mar. 26, 2001, at 1B.

35. *Id.*

36. *Id.*

district broke its contract by hiring substitutes (without benefits) instead of permanent, full-time teachers.³⁷

Teachers are entitled to a ten percent discount on their rent if they live in units owned by Equity Residential Properties Trust, one of the country's biggest apartment firms.³⁸

E. Background Checks

An associate dean at Florida A & M University resigned after the University found out about a 1996 rape conviction in Texas.³⁹ While the University conducts background checks for some positions, none is required for jobs entailing primarily teaching and administrative duties.⁴⁰ Similarly, Miami offered the directorship of the General Services Administration to a man forced to resign from a position in Homestead for lying on his resume.⁴¹ The offer of employment is under review.⁴²

The Florida Legislature approved a bill calling for "greater disclosure of incidents of inappropriate behavior by teachers" in the wake of reports about Broward teacher Harry Dellas, charged with propositioning a student to have sex for money.⁴³ The law makes clear that problem teachers cannot avoid losing their jobs merely by transferring to another district.⁴⁴ The law also penalizes a district superintendent who fails to report problem teachers to the Florida Education Commissioner's office.⁴⁵

F. Police Recruitment

To fill 200 job openings, Miami is resorting to forty billboards portraying police officers in action as a recruitment tool.⁴⁶ Police candidates undergo rigorous tests and background checks as well as completing a half-

37. *Id.*

38. *Rent Discount is Offered to Teachers*, MIAMI HERALD, May 22, 2001, at 3B.

39. *Dean Quits After Conviction Revealed*, MIAMI HERALD, Aug. 30, 2000, at 13B.

40. *Id.*

41. *City of Miami Official's Resume Under Scrutiny*, MIAMI HERALD, May 18, 2001, at 3B.

42. *Id.*

43. Charles Savage, "Bad Teachers" Bil-Eyed, MIAMI HERALD, May 4, 2001, at 7B.

44. *Id.*

45. *Id.*

46. Mireidy Fernandez & Tere Figueras, *Billboards to Entice Police for Recruits*, MIAMI HERALD, Nov. 18, 2000, at 4B.

year stint at the police academy to become an officer.⁴⁷ Pay starts at \$27,561 a year.⁴⁸

G. *Cheating on Hiring Exam*

The state and the Broward School District allege that an assistant principal at a Pompano Beach middle school cheated on the Florida Educational Leadership Exam by finding a substitute to take it for him.⁴⁹ Handwriting analysis and non-matching Social Security numbers tipped off the authorities.⁵⁰ The state could revoke the principal's certification.⁵¹

H. *Promotions*

The proper procedure for making temporary promotions in Miramar's fire department came before the city's Civil Service Board.⁵² The board addressed whether the city follows its own rules involving temporary promotions after a firefighter alleged the city wrongly passed him over for a temporary promotion to captain.⁵³ Under the city's rules, temporary promotions last up to six months. Then the post, if still unfilled, goes to the top scorer on the captain's exam.⁵⁴

III. TERMS OF EMPLOYMENT

A. *Hours and Wages*

The United States Supreme Court handed down two decisions last term that have an impact on the hours and wages of public employees. In *United States v. Hatter*,⁵⁵ the Court ruled that the compensation clause did not bar Congress from withholding Social Security taxes from judicial salaries.⁵⁶

47. *Id.*

48. *Id.*

49. Elena Cabral, *Schools: Assistant Principal Cheated*, MIAMI HERALD, Mar. 17, 2001, at 1B.

50. *Id.*

51. *Id.*

52. Natalie P. McNeal, *Miramor Board Hears Promotion Complaints*, MIAMI HERALD, Apr. 10, 2001, at 6B.

53. *Id.*

54. *Id.*

55. 121 S. Ct. 1782 (2001).

56. *Id.* at 1787.

All the same, the Court held that the Compensation Clause did prohibit Congress from collecting Social Security taxes, but not Medicare taxes, from federal judges appointed before the tax became law.⁵⁷

In *United States v. Cleveland Indians Baseball Co.*,⁵⁸ the Court ruled that back wages are subject to Federal Insurance Contributions Act (“FICA”) and Federal Unemployment Tax Act (“FUTA”) taxes according to the year in which wages are in fact paid, not the year(s) when they were earned.⁵⁹

In keeping with Governor Jeb Bush’s aim of tying bonuses to performance, Florida Education Secretary Jim Horne’s bonus package was put off until 2003.⁶⁰ Florida Board of Education members, however, say Florida’s top education official’s salary must be substantially raised to compete with other states for education leaders.⁶¹

Broward school district’s \$18 million payroll computer upgrade suffered software glitches, delaying hundreds of school workers’ checks.⁶² About 12,500 of the district’s employees work during the summer.⁶³

Miami-Dade County commissioners voted to double their expense accounts by \$1000 a month.⁶⁴ Critics of the current system say elected officials should be held accountable for how they spend their allowances.⁶⁵ Some claim expense accounts are simply a way to sidestep the county charter, which limits commission salaries at \$6000 a year.⁶⁶

Schools that either earned an “A” or bettered itself by one grade level receive bonuses.⁶⁷ South Plantation High School won \$244,000 which came out to \$1500 per teacher who returned for the 2000–01 term.⁶⁸ One teacher who returned but left in the middle of the year is suing the school board after she was denied the bonus money.⁶⁹

57. *Id.*

58. 121 S. Ct. 1433 (2001).

59. *Id.* at 407.

60. *Governor Urges Delay in Education Bonuses*, MIAMI HERALD, July 31, 2001, at 9B.

61. *Id.*

62. Steve Harrison, *Computer Woes Delay Hundreds of School Workers’ Checks*, MIAMI HERALD, Aug. 1, 2001, at 8B.

63. *Id.*

64. Don Finefrock, *Dade Leaders May Hike Pay for Expenses*, MIAMI HERALD, Sept. 19, 2000, at 9B.

65. *Id.*

66. *Id.*

67. Susan Ferrechio, *Schools Hit with Suit over Bonus*, MIAMI HERALD, Apr. 5, 2001, at 3B.

68. *Id.*

69. *Id.*

Soaring overtime pay led the Miramar Fire Department to put in place cost-saving measures, including clamping down on sick leave.⁷⁰ Overtime rose as five members of the department retired on disability.⁷¹

Under Miami-Dade County's Efficiency and Competition Commission, public employees earn incentive bonuses for suggesting cost-saving ideas that lead to higher productivity.⁷²

Broward County is considering a proposal to increase the minimum wage for county workers from \$5.15 an hour to \$8.56, patterned after an ordinance adopted in Miami-Dade County in 1999.⁷³ Sixty counties and cities have enacted so-called living wage ordinances since 1994.⁷⁴

Governor Jeb Bush's 2001 state budget contains an increase of \$739 million, or six and three tenths percent, for Florida public schools.⁷⁵ A group of educators, however, claim that most of that money goes to "one-time teacher bonuses and program funds, not salaries for teachers and school employees."⁷⁶

B. Benefits

1. Jury Duty Release

Under state law, employers are prohibited from dismissing employees or threatening to fire them because of jury duty.⁷⁷ Even so, a Hallandale Beach firefighter had to turn in his badge when he did not show up for work and complete his shift after jury duty.⁷⁸ A judge had ordered the jurors to go home and rest.⁷⁹

70. Natalie P. McNeal, *Overtime Cut Back by Fire Officials*, MIAMI HERALD, Dec. 8, 2000, at 1B.

71. *Id.*

72. *County Employees Save Taxpayers \$43 Million over Last Two Years*, MIAMI HERALD, Jan. 21, 2001, at 5B.

73. Brad Bennett & Lisa Arthur, *Higher Minimum Wage is Proposed*, MIAMI HERALD, Apr. 11, 2001, at 1B.

74. *Id.*

75. Amanda Riddle, *Bush Urged to Devote Vetoed Funds to Teacher Pay*, MIAMI HERALD, June 27, 2001, at 9B.

76. *Id.*

77. Daniel de Vise, *Firm Cited for Firing Juror Now Facing Judge*, MIAMI HERALD, Aug. 22, 2000, at 1B.

78. *Id.*

79. *Id.*

2. Disability and Death Benefits

Florida Attorney General Bob Butterworth approved a \$25,000 payment from a crime victim's fund to the same sex companion of a slain police officer.⁸⁰ At the same time, Tampa is assessing its benefits policy that denies pension benefits, life insurance, health insurance and family leave to same sex partners.⁸¹

In *State v. Herny*,⁸² a claimant secured a health insurance subsidy because of his eligibility for state disability retirement.⁸³ The subsidy aids state retirees in paying health insurance premiums.⁸⁴ It does not qualify as a disability benefit.⁸⁵ For this reason, the court did not treat the subsidy as a benefit from a collateral source which may be offset against workers' compensation benefits based upon claimant's receipt of in the line of duty disability retirement and social security disability benefits.⁸⁶ The Supreme Court of Florida sustained the decision of the judge of compensation claims and the decision of the First District Court of Appeal to refuse to include the claimant's subsidy within the limit on benefits under section 440.20(15) of the *Florida Statutes*.⁸⁷

3. Public Pensions

a. Legislation

Governor Jeb Bush and his cabinet approved a proposal that gives 650,000 state employees more control over their retirement.⁸⁸ Existing defined benefit pensions would be replaced by defined contribution plans that enable employees the chance to invest in funds with higher returns.⁸⁹ Under the program, about \$15 billion of the \$107 billion of the state's

80. *State Gives Slain Cop's Companion \$25,000*, MIAMI HERALD, July 21, 2001, at 9B.

81. *Id.*

82. 781 So. 2d 1067 (Fla. 2001).

83. *Id.* at 1068.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Herny*, 781 So. 2d at 1068; see FLA. STAT. § 440.20(15) (1985).

88. Brent Kallestad, *New Options Proposed for State Employees' Pensions*, MIAMI HERALD, Sept. 27, 2000, at 11B.

89. *Id.*

pension fund would be tapped beginning in the summer of 2002.⁹⁰ Another bill, HB 1505, aims at improving health and pension benefits for teachers.⁹¹

Miramar city commissioners, unhappy with three different levels of the city's contribution to firefighters' pension funds, settled on a single amount: thirteen and one tenth percent.⁹² The issue was the key reason firefighters had been working without a contract since 1999.

b. *Ethical Opinion*

Florida's Commission on Ethics ruled that a Pompano Beach commissioner, a retired firefighter, was entitled to vote on pension benefits issues for retired firefighters on the ground that those votes benefit a whole class, not the commissioner personally.⁹³

c. *Misuse of Public Pension Funds*

Former Miami Chief of Police Donald Warshaw was convicted of fraud consisting of a number of suspicious financial transactions that channeled money from a police pension fund to an alleged embezzler.⁹⁴ Warshaw also used a city police pension fund check to pay for personal shopping and entertainment.⁹⁵

An internal audit revealed that the Miami Police Department violated federal guidelines when it spent \$2.55 million in public pension fund money on non law enforcement related activities such as on operating expenses and charities.⁹⁶ Moreover, the report turned up that the "trust had not been audited since 1994,"⁹⁷ a violation of federal tax laws.

90. *Id.*

91. *Teacher Shortages*, MIAMI HERALD, Mar. 21, 2001, at 12B.

92. Elena Cabral, *Miramar OKs Changes in Firefighters' Fund*, MIAMI HERALD, Sept. 7, 2000, at 3B.

93. Steve Bousquet, *Case Against Jenne Fizzles*, MIAMI HERALD, Aug. 25, 2000, at 1B.

94. Tom Dubocq, *Warshaw Probed over Funds Taken from Pension Account*, MIAMI HERALD, Oct. 2, 2000, at 9B.

95. Tom Dubocq, *Pension Fund Paid Chief's Card Bill*, MIAMI HERALD, Sept. 10, 2000, at 1B.

96. Charles Rabin, *New Audit of Police Trust Fund Reveals Rules Were Broken*, MIAMI HERALD, Oct. 19, 2000, at 10B.

97. *Id.*

The president of the union representing Miami-Dade transit workers lost his post after allegations that he may have wrongfully taken money the county had paid the union for retirement benefits.⁹⁸

d. *Forfeiture of Public Pension over Official Misconduct*

Under Florida law,⁹⁹ pension boards have discretion to deny a public employee's pension for the following reasons: embezzling public funds, stealing from one's employer, accepting a bribe or for committing a felony that defrauds the public. Former Miami City Manager Donald Warshaw may lose his police pension after his conviction on public corruption charges.¹⁰⁰

In *Jacobo v. Board of Trustees of the Miami Police*,¹⁰¹ a police officer was convicted of a felony for lying on an arrest affidavit that a suspect who was injured by a fellow officer was toting a firearm at the time.¹⁰² As a result, the police pension fund board ordered the police officer's pension be forfeited.¹⁰³ On appeal, the court sustained the administrative action, agreeing that the officer committed a breach of the public trust.¹⁰⁴

e. *Public Pension Fund Investments*

Governor Jeb Bush, together with two officials who run Florida's \$100 billion public pension fund voted to remove a ban on investments in tobacco companies to take advantage of rising tobacco stock prices.¹⁰⁵ The state pension fund covers teachers, firefighters, police officers and other city, county, and state public employees.¹⁰⁶ Altogether, 680 public employees make up the Florida Retirement System Trust Fund.¹⁰⁷

98. Karl Ross, *Union President Removed After Fiscal Inquiry*, MIAMI HERALD, Apr. 14, 2001, at 12B.

99. FLA. STAT. § 112.3173 (2000).

100. Tyler Bridges, *Personal Pension with City Could be at Stake*, MIAMI HERALD, Sept. 29, 2000, at 16A.

101. 788 So. 2d 362 (Fla. 3d Dist. Ct. App. 2001).

102. *Id.* at 363.

103. *Id.* at 364.

104. *Id.* at 365.

105. *National Briefing*, N.Y. TIMES, June 13, 2001, at A31.

106. Lesley Clark, *State Pension Fund Resumes Tobacco Stock Purchases*, MIAMI HERALD, July 4, 2001, at 9B.

107. *Id.*

f. *Controversial Public Pension Options*

Florida's Deferred Retirement Option Program ("DROP") enables older public employees to retire with an amount tied to their salary and years of service.¹⁰⁸ Broward Public Defender Alan Schreiber took advantage of this program, under which he receives between \$400,000 and \$500,000 when he retires after thirty years as a state employee and another \$100,000 a year.¹⁰⁹

In a controversial move touted as a cost-saving measure, the Hallandale Beach Commission gave management credit in the general employees' pension without forcing them to contribute, an arrangement that would be illegal in the private sector.¹¹⁰ Under the arrangement, managerial employees need only contribute for future credit in the plan, but not for retroactive credit.¹¹¹

4. Privacy

a. *Drug Testing*

In *State Department of Transportation v. Plummer*,¹¹² the court addressed the relationship between the state's Drug-Free Workplace Act¹¹³ and the Federal Omnibus Transportation Employee Testing Act and Regulation¹¹⁴ in a discovery case.¹¹⁵ While the court sustained the hearing officer and the Public Employees Relations Commission to the extent they ordered discovery of drug test results of a particular employee challenging a disciplinary action, the order releasing information on other test-takers was deemed preempted by federal law.¹¹⁶

A Fort Lauderdale firefighter who tampered with his drug test to dodge testing positive for passive inhalation of marijuana won both his job back

108. Beth Reinhard, *A Golden Parachute for Public Defender*, MIAMI HERALD, Feb. 22, 2001, at 1B.

109. *Id.*

110. Griff Witte, *Executive Pension Shuffle in Question*, MIAMI HERALD, Apr. 6, 2001, at 1B.

111. *Id.* at 2B.

112. 774 So. 2d 945 (Fla. 1st Dist. Ct. App. 2001).

113. FLA. STAT. § 112.0455(11)(b).

114. 49 U.S.C. § 31306; 49 C.F.R. § 382.405(g).

115. *Plummer*, 774 So. 2d at 945 (Fla. 1st Dist. Ct. App. 2001).

116. *Id.* at 947.

and a promotion to lieutenant.¹¹⁷ The arbitrator ruled that the city did not have in place a zero tolerance policy for employees who doctor a drug test, or refuse to take it altogether. Only firefighters who test positive for drug use on or off duty face mandatory dismissal.

b. *Disclosures by Public Employees*

In *State v. Webb*,¹¹⁸ the court sustained the conviction of a school board member who waited four months before allowing access to public records and unduly restricting that access once it was allowed.¹¹⁹

The Florida Legislature passed a public records exemption bill that omits the home addresses and telephone numbers from the personnel files of public sector human rights managers.¹²⁰ The bill aims at protecting the privacy of public officials who are open to threats after discharging public employees.¹²¹

Under rules set by the State Bureau of Archives and Records Management, police officers' personnel records are kept fifty years after an officer's retirement.¹²² But internal affairs inquiries that turn up no wrong-doing can be destroyed after a year.¹²³ Records are kept three years for inquiries leading to a reprimand and five years following discipline.¹²⁴ A *Miami Herald* editorial criticized the destruction after one year option as depriving "both the public and the police executives of essential information indicating patterns of behavior."¹²⁵

c. *Surveillance of Public Employees' Private Lives*

A fired lieutenant in the Broward Sheriff's office complained to the Commission on Ethics that the sheriff illegally ran background checks.¹²⁶

117. Brittany Wallman, *Fired Firefighter Gets Job Back, Promotion*, SUN-SENTINEL, (Ft. Lauderdale), Jan. 26, 2001 at 3B.

118. 786 So. 2d 602 (Fla. 1st Dist. Ct. App. 2001).

119. *Id.* at 603. See FLA. STAT. § 119.07(1)(a).

120. Beth Reinhard, *Lawmakers Nibble Away at Public-Records Laws*, MIAMI HERALD, May 3, 2001, at B1.

121. *Id.*

122. Leslie Clark, *Repeal This Rule*, MIAMI HERALD, July 17, 2001, at 6B.

123. *Id.*

124. *Id.*

125. *Id.*

126. Steve Bousquet, *Case Against Jenne Fizzles*, MIAMI HERALD, Aug. 25, 2000, at 1B.

The commission concluded such a practice is legal and threw out the complaint.¹²⁷ The ethics panel found no evidence the sheriff sought the information solely for personal gain.¹²⁸ State law bars public officials from “using information not available to the public . . . for the personal benefit of themselves or others.”¹²⁹

5. Loss of Job Security

The Florida Legislature shifted over 16,000 mid-level state employees from the career service system to management positions.¹³⁰ In effect, these workers shed job security (such as seniority and “bumping” rights) in exchange for the chance to earn bonuses.¹³¹ Specifically, managers and supervisors will be transferred from Career Service status to selected exempt service status.¹³²

Governor Jeb Bush’s “Service First” initiative, aimed at running the state like a business, also contemplates allowing state employees to cash in unused sick leave or have it allotted to early retirement.¹³³ Moreover, employees’ performances would be assessed every ninety days, not just once-a-year.¹³⁴ Opponents fear the new system will promote “cronyism, favoritism and discrimination.”¹³⁵ The burden in discipline cases would be shifted from the employer to the employee as well.¹³⁶

As a *Miami Herald* editorial put it: “[c]ivil-service reform came to Florida fifty years ago to stop the ‘suitcase parades’ occurring after every election where the friends of the winners were rewarded with cushy jobs and the losers were sent packing.”¹³⁷ It remains to be seen whether this year’s civil service reform does not revive patronage.

127. *Id.*

128. *Id.*

129. *Id.* at 2B.

130. *Top Issues of 2001*, MIAMI HERALD, May 6, 2001, at 28A.

131. *Id.*

132. Mario Diaz-Balart, *HB 369 Streamlines the Civil Service System*, MIAMI HERALD, Apr. 2, 2001, at 10B.

133. Steve Bousquet, *Governor Proposes Merit Pay System for State Employees*, MIAMI HERALD, Mar. 2, 2001, at 1B.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Civil-Service Reform*, MIAMI HERALD, Mar. 16, 2001, at 10B.

6. Health Benefits

Beginning in 2001, Broward County put into effect a self-insurance program for public employees prescription drug coverage.¹³⁸

President Bush announced that he would endorse enactment of a bill barring insurance companies and employers from applying newly developed tests of an individual's genetic composition to turn them down for medical coverage or for jobs.¹³⁹

About 30,000 Broward public school district workers most likely must pay more for their health insurance after the district's insurers failed to honor their contracts.¹⁴⁰ The school system is weighing whether to sue the insurers for damages.¹⁴¹ Subsequently, Humana was selected by the Broward public school district to take over health insurance for 9000 school employees and their families formerly insured by Foundation (who backed out of its contract to insure the district through 2001).¹⁴² The school district will pick up the \$16.5 million rate hike Humana insists upon to deliver the same level of service as Foundation.¹⁴³ For their part, employees may have to forego ten million dollars earmarked for a one percent pay raise.¹⁴⁴

A circuit court judge addressed the issue whether the city of Miami promised retirees that their health insurance rates would never increase.¹⁴⁵ The court ruled that the city broke its promise more than twenty years ago when it increased health insurance rates for retirees.¹⁴⁶

7. Occupational Health and Safety Issues

Hialeah firefighters held a protest over health and safety conditions at their station where they sleep and work. Remodeling has generated

138. Charles Savage, *County Overhaul Aims to Create Self-Funded Insurance*, MIAMI HERALD, Sept. 15, 2000, at 5B.

139. David E. Sanger, *President: Genes Shouldn't Bar Insurance or Job*, MIAMI HERALD, June 24, 2001, at 26A.

140. Susan Ferrechio, *School Employees Face Insurance Hike*, MIAMI HERALD, Oct. 31, 2000, at 3B.

141. *Id.*

142. Susan Ferrechio, *Schools Insurance Fix Could be Costly*, MIAMI HERALD, Nov. 7, 2000, at 3B.

143. *Id.*

144. *Id.*

145. Charles Rabin, *Pension Feud is Boiling*, MIAMI HERALD, Oct. 26, 2000, at 1B.

146. *Id.*

construction dust, exposed ceilings and weak walls.¹⁴⁷

Teachers at a center for youthful sex offenders had to leave after the state fire marshall uncovered several safety violations.¹⁴⁸ For example, keys to exit doors were not easily accessible; combustibles were left in the stairwell, furniture was blocking the hallway, and there were dangerously dangling electrical cords.¹⁴⁹

8. Teacher Training

Governor Jeb Bush vetoed \$275,000 set aside in the 2001 state budget that enables teachers to study Florida's history, literature and culture for a week.¹⁵⁰ Florida currently spends \$36 million on teacher-training programs.¹⁵¹

9. Tort Insurance for Teachers

Even though state law accords immunity for teachers who act properly within the scope of their employment, the legislature earmarked \$1.2 million for liability insurance for public school teachers.¹⁵² Instead of requiring competitive bids for teachers' insurance, the bill designates a specific private company known as an anti-union firm.

IV. DISCIPLINE, DISCHARGE, AND REDUCTIONS-IN-FORCE

A. *Off-Duty Misconduct*

A Miami-Dade police officer was prosecuted for plotting with a fellow patrolman and others to steal drugs and money from dope dealers.¹⁵³ The

147. Carolyn Salazar, *Job Conditions Trigger Protest by Firefighters*, MIAMI HERALD, May 27, 2001, at 3B.

148. Susan Ferrechio & Carol Manbin Miller, *Power Failure Forces Teachers from Center Again*, MIAMI HERALD, Mar. 15, 2001, at 3B.

149. *Id.*

150. *Bush Budget Cut Leaves Teachers Seeking Funds*, MIAMI HERALD, July 10, 2001, at 7B.

151. *Id.*

152. Steve Bousquet & Lesley Clark, *Insurer Plans Raise Issues*, MIAMI HERALD, May 4, 2001, at 6B.

153. Frances Robles, *Six Go to Trial in Drug Ripoffs*, MIAMI HERALD, Oct. 2, 2000, at 9B.

trial was notable for going through 300 prospective jurors unable to sit on a case that lasted four months.¹⁵⁴

A labor arbitrator concluded that Miami Beach had just cause to dismiss a police officer for conduct unbecoming an employee of the city.¹⁵⁵ The police officer allegedly committed misconduct with a seventeen-year-old girl, even though he was acquitted by a jury.¹⁵⁶

Two Palm Beach County Sheriff's deputies are under investigation for allegedly posing on pornographic websites.¹⁵⁷

B. *On-the-Job Misconduct*

A Broward County middle school security guard was arrested for allegedly molesting two male students.¹⁵⁸

A state corrections officer was discharged from his job after he was arrested for his part in a prostitution ring, run by his wife.¹⁵⁹

About a dozen detention officers at the Krome detention center were disciplined for alleged abuse, theft and sexual misconduct.¹⁶⁰

Two firefighters resigned from the fire department after they were arrested and charged for filing false tax returns and for tax evasion.¹⁶¹

Fort Lauderdale's Equal Opportunity Office director was placed on administrative leave with pay on grounds of a conflict of interest after she filed a retaliation complaint against the city.¹⁶²

154. *Id.*

155. *Arbitrator Upholds Ex-Officer's Termination*, MIAMI HERALD, July 22, 2001, at 3B.

156. *Id.*

157. Bill Douthat, *Cops Probed over Porn Websites*, MIAMI HERALD, Dec. 7, 2000, at 12B.

158. David Green, *Middle-School Security Guard Accused of Molesting Boys*, MIAMI HERALD, Nov. 14, 2000, at 1B. The allegation was for lewd and lascivious molestation and sexual battery. *Id.*

159. *Corrections Officer Arrested in Sex Ring Bust*, MIAMI HERALD, Oct. 4, 2000, at 13B.

160. Alfonso Chardy, *Ex Krome Center Officer Denies Wrongdoing, Admits Three Claims*, MIAMI HERALD, Sept. 19, 2000, at 3B.

161. Wanda J. DeMarzo, *Former Firefighter Gets Jail Time, IRS Tab*, MIAMI HERALD, Aug. 20, 2000, at 6B.

162. Brad Bennett, *Rights Official Ordered on Leave*, MIAMI HERALD, Aug. 8, 2001, at 1B.

Former Miami Finance Director plead guilty to soliciting kickbacks from a city contractor. The plea agreement included one felony count of conspiracy to commit extortion, bribery and money laundering.¹⁶³

A Manatee County sheriff's deputy was sent to federal prison for shaking down motorists, stealing from crime victims and aiding another deputy set fire to a truck to collect insurance.¹⁶⁴

A Florida Atlantic University professor resigned after he was accused of using FAU Visa cards to bet \$7000 on Internet gambling.¹⁶⁵

In *Miami-Dade County v. Jones*,¹⁶⁶ the court concluded the public employer was vested with discretion whether to take into account or to ignore mitigating factors before imposing discipline on a nursing technician dismissed for tardiness and absenteeism.¹⁶⁷

In *Declat v. Dep't of Children and Families*,¹⁶⁸ the court sustained a hearing officer's conclusion that discipline was warranted against a public employee who lied to his supervisor and was negligent in the performance of his duties.¹⁶⁹ Specifically, the employee told his supervisor he had reviewed the file of a child who later died from abuse when in fact the public employee had not reviewed the file.¹⁷⁰

The state attorney's office issued an opinion concluding that a candidate running for reelection as Broward clerk of courts did not break the law when he inserted thank-you notes in the pay envelopes of jurors.¹⁷¹

In *Bamawo v. Dep't of Corrections*,¹⁷² the court ruled that the Department of Corrections was entitled to dispense with the usual ten day notice for dismissal or suspension where the employee posed a physical threat to supervisors.¹⁷³ Moreover, the Public Employees Relations Commission did not abuse its discretion in refusing to mitigate the discipline

163. Luisa Yanez, *Miami's Ex-Finance Director Pleads Guilty to Kickbacks*, MIAMI HERALD, Aug. 7, 2001, at 3B.

164. Vickie Chacere, *Judge Sends Shakedown Officer to Federal Prison*, MIAMI HERALD, Aug. 19, 2000, at 5B.

165. *Professor Resigns Amid Inquiry*, MIAMI HERALD, Aug. 25, 2000, at 3B.

166. 778 So. 2d 409 (Fla. 3d Dist. Ct. App. 2001).

167. *Id.*

168. 776 So. 2d 1000 (Fla. 5th Dist. Ct. App. 2001).

169. *Id.*

170. *Id.*

171. Caroline J. Keough, *Clerk's Thank-You Notes Not Illegal, State Says*, MIAMI HERALD, Oct. 4, 2000, at 2B.

172. 785 So. 2d 610 (Fla. 3d Dist. Ct. App. 2001).

173. *Id.* at 611.

imposed in light of the gravity of the employee's misconduct.¹⁷⁴ In this regard, the court made clear, the employee bears the burden of proving that his or her punishment ought to be reduced.¹⁷⁵

A community relations employee with the Broward County bus system was ordered to report to work "on a daily basis" after the *Miami Herald* reported that his job did not require him to come in to work and had few official duties.¹⁷⁶

A twenty-two-year veteran Miami-Dade sanitation employee lost his job after accepting money for looking the other way while someone dumped roof material at a trash center instead of a landfill.¹⁷⁷

A prominent researcher at Florida Atlantic University is under investigation over whether he used school resources to aid his private business.¹⁷⁸ In response, the university is drafting policies on conflict-of-interest cases in the area of technology transfer (i.e., turning research into business).¹⁷⁹

C. Retaliation, Whistle-Blowing, the First Amendment

1. Retaliation

A Fort Lauderdale parking enforcement officer has alleged in a lawsuit that she was retaliated against after she claimed that a co-worker sexually harassed her.¹⁸⁰ Retaliation came in the form of a poor evaluation and insistence that she get a doctor to sign-off whenever she sought sick leave.¹⁸¹

Black prison guards alleged they have been harassed for suing the Department of Corrections over racial discrimination.¹⁸² One guard had been reassigned to a desk job and another alleges he was assaulted at work

174. *Id.*

175. *Id.*

176. Charles Savage, *Walters Told to Be at Job Daily*, MIAMI HERALD, Aug. 16, 2000, at 3B.

177. Joan Fleischman, *Tale of 2 Waste Workers: Is This Equal Justice?*, MIAMI HERALD, Aug. 13, 2000, at 2B.

178. Holly Stepp, *Licensing Case Puts FAU in Spotlight*, MIAMI HERALD, Mar. 26, 2001, at 1B.

179. *Id.*

180. Brad Bennett, *Lauderdale Worker Charges City Retaliation*, MIAMI HERALD, June 14, 2001, at 2B.

181. *Id.*

182. Lesley Clark, *State to Inspect Guards' Reports of Harassment*, MIAMI HERALD, Apr. 20, 2001, at 5B.

owing to his role in the lawsuit.¹⁸³ Other forms of retaliation include: death threats, being passed over for promotion, and being denied training.¹⁸⁴

2. Whistle-Blowing

A Florida appeal court overturned a jury verdict entitling former Hollywood Police Chief Richard Witt to \$200,600 after finding that the city broke the state's whistle-blower law¹⁸⁵ when it dismissed him in 1996.¹⁸⁶ The Fourth District Court of Appeal held that the city charter makes clear that the police chief is an at-will employee who may be dismissed at the city manager's discretion.¹⁸⁷ Florida's public employee Whistle-Blower's Act¹⁸⁸ has been interpreted to be a remedial act entitled to a liberal construction.¹⁸⁹

A former attorney for the Florida Department of Health and Rehabilitative Service¹⁹⁰ recovered \$238,312 in back pay in a jury verdict six years after she had been discharged for reporting that her supervisor was neglecting his job and falsifying time records.¹⁹¹ The jury concluded the former attorney was dismissed in retaliation for whistle-blowing.¹⁹²

3. The First Amendment

In *Rice-Lamar v. City of Fort Lauderdale*,¹⁹³ the Eleventh Circuit reviewed the discharge of a city's affirmative action specialist who claimed her dismissal was in retaliation for exercising her first amendment rights.¹⁹⁴ Applying a four-part First Amendment retaliation test, the court assumed that plaintiff's speech touched on a matter of public concern but concluded that her first amendment right was outweighed by the city's interests:

183. *Id.*

184. *Id.*

185. State whistle-blower laws aim at protecting employees who report misconduct by their employer.

186. Erika Bolstad, *Hollywood Ex-Chief's Legal Victory Overturned*, MIAMI HERALD, June 28, 2001, at 1A.

187. *Id.*

188. See FLA. STAT. § 112.3187 (2000).

189. *Irven v. Dep't of Health & Rehab. Servs.*, 790 So. 2d 403 (Fla. 2001).

190. Now the Department of Children & Families.

191. Elaine De Valle, *Child Advocate Wins Whistle-Blower Case*, MIAMI HERALD, Aug. 11, 2001, at 6B.

192. *Id.*

193. 232 F.3d 836 (11th Cir. 2000).

194. *Id.*

plaintiff was not entitled to refuse to perform a lawful task well within the scope of her duties.¹⁹⁵

The President of Florida International University personally endorsed then-presidential candidate George W. Bush when he campaigned on campus before the November 2000 election.¹⁹⁶ Some in the FIU community complained that FIU's President abused his position by his endorsement while his defenders insist he was entitled to speak his mind as a matter of academic freedom.¹⁹⁷ Apparently, no clear-cut rules govern such political endorsements by a state university president.

The First Amendment right of on-duty police officers to engage in partisan politics arose in South Florida before the November 2000 election.¹⁹⁸ Over 50 people complained after 100 Hollywood police officers knocked on doors to urge citizens to vote for a measure involving police service in unincorporated areas.¹⁹⁹ Under Hollywood's administrative policy, employees are barred from engaging in political activity while on-duty.²⁰⁰ But a city attorney claimed that the rule only governs partisan politics.²⁰¹

A Florida trial judge faced a disciplinary proceeding after referring to an election opponent as "a part-time judge in a full-time job."²⁰² A trial judge in Pensacola, Florida, faced removal after calling an election opponent "Judge Let 'em Go Green."²⁰³

Miami-Dade's firefighters' union fought with the fire chief over members' display of mayoral campaign stickers and signs on their private cars in employee parking lots.²⁰⁴ An ordinance that governs political activity by public employees does not address the issue. The larger question of campaigning on public property is currently being sorted out by the county's attorney.

195. *Id.*

196. Mark Silva, *Outrage at FIU over President's Boost for Bush*, MIAMI HERALD, Aug. 30, 2000, at 11B.

197. *Id.*

198. Ana Rhodes & Erika Bolstad, *Police Campaign Sparks Complaints*, Nov. 3, 2000, at 5B.

199. *Id.*

200. *Id.*

201. *Id.*

202. William Glaberson, *States Rein in Truth Bending in Court Races*, N.Y. TIMES, Aug. 23, 2000, at A1.

203. *Id.*

204. Andres Viglucci, *Dade Firefighters in 4-Alarm Political Feud*, MIAMI HERALD, Aug. 18, 2000, at 8B.

D. Employment Discrimination

1. Generally

At least six complaints and lawsuits have been filed with the E.E.O.C. in the last couple of years against the city of Fort Lauderdale alleging discrimination, harassment and retaliation. Oddly enough, the city's own diversity manager filed a bias complaint.²⁰⁵ The United States Commission on Civil Rights is currently reviewing racial bias claims lodged by black city of Fort Lauderdale employees.²⁰⁶ The city risks losing federal funding for roads, low-income housing and added police.²⁰⁷ The Fort Lauderdale NAACP has come out in support of city employees who are suing the city for alleged racial discrimination.²⁰⁸

Highway patrol troopers in Miami-Dade face intensive sensitivity training in light of allegations that three supervisors uttered racial and ethnic epithets and pored over pornographic pictures on the job.²⁰⁹

Fort Lauderdale paralegal Brian Neiman was permanently enjoined from practicing law without a license.²¹⁰ Among other cases, Neiman filed a civil rights lawsuit on behalf of twenty nine employees against the Broward Clerk of Courts.²¹¹ The County paid \$1.3 million to settle the case.²¹²

2. Race

In *Crapp v. City of Miami Beach*,²¹³ the Eleventh Circuit addressed what evidence it would admit with regard to whether a termination was the product of unlawful race discrimination or for a legitimate reason.²¹⁴ Here,

205. Brad Bennett, *Lauderdale Worker Files Bias Complaint*, MIAMI HERALD, July 24, 2001, at 2B.

206. Brad Bennett, *Civil Rights Complaints Studied*, MIAMI HERALD, June 23, 2001, at 3B.

207. *Id.*

208. Brad Bennett, *NAACP Asks Lauderdale to Resolve Race Bias Claims*, MIAMI HERALD, June 15, 2001, at 8B.

209. Phil Long & Marika Lynch, *Troopers Will Get Wet Sensitivity Training*, MIAMI HERALD, Mar. 3, 2001, at 1B.

210. Sue Reisinger, *Judge Wants Paralegal Stopped*, MIAMI HERALD, Sept. 19, 2000, at 1B.

211. *Id.*

212. *Id.*

213. 242 F.3d 1017 (11th Cir. 2001).

214. *Id.* at 1020.

the court ruled that poor performance by the fired employees amounted to admissible evidence that their dismissal was non-race-related.²¹⁵

In *Bass v. Board of County Commissioners*,²¹⁶ the Eleventh Circuit ruled that all claims of race discrimination, no matter the skin color of the claimant, would face the same analysis.²¹⁷ Specifically, claims by white employees, instead of being framed as “reverse discrimination” claims, would undergo the same analysis as any other racial bias claim.²¹⁸ Moreover, the court ruled that any affirmative action plan must satisfy strict scrutiny under Title VII and the Equal Protection Clause.²¹⁹

In *Silvera v. Orange County School Board*,²²⁰ a black maintenance employee, fired for an old conviction for lewd assault on a child, claimed he was treated unfairly as compared to a similarly situated white employee.²²¹ The court ruled the two employees were not similarly situated: the black employee had three additional arrests for violent assaults, two of them recent and the employer was contractually bound not to dismiss the white employee owing to his conviction.²²²

In *Davis v. Town of Lake Park*,²²³ the Eleventh Circuit addressed a commonly litigated issue: what constitutes an “adverse employment action” for purposes of suing under Title VII?²²⁴ In *Davis*, an African-American police officer was accused of neglecting a key element of his job and was told that any future leave requests would be denied until all his paperwork was turned in.²²⁵ The court concluded that since the officer faced no loss of pay or benefits or suffer other discipline, he did not prove an adverse employment action.²²⁶

A federal jury awarded a former Fort Lauderdale city maintenance employee \$275,000 (including attorneys’ fees), finding that she was the victim of gender and race discrimination.²²⁷ Specifically, the jury awarded

215. *Id.*

216. 242 F.3d 996 (11th Cir. 2001). *See* cases reversed by 256 F.3d 1095.

217. *Id.* at 1003.

218. *Id.*

219. *Id.* at 1013.

220. 244 F.3d 1253 (11th Cir. 2001).

221. *Id.* at 1257.

222. *Id.*

223. 245 F.3d 1232 (11th Cir. 2001).

224. *Id.*

225. *Id.* at 1235.

226. *Id.* at 1246.

227. Brad Bennett, *\$275,000 to Lauderdale Bias Victim*, MIAMI HERALD, Feb. 16, 2001, at 3B.

\$200,000 for emotional distress in a hostile work environment and \$75,000 in back pay.²²⁸

The E.E.O.C. issued a memo concluding that the Broward Sheriff's Office "probably discriminated against five black and Hispanic deputies and one black sergeant by denying them promotions."²²⁹ Plaintiffs claim they passed a written exam but that the oral portion which they failed was subjective, allowing the employer to promote non-Hispanic whites with equal or less experience.²³⁰ In response, the sheriff simply recited that forty one percent of those promoted since he took office in 1988 have been minorities.²³¹ Plaintiffs seek lost wages and punitive damages among other remedies.²³²

3. Gender

In *Clark County School District v. Breeden*,²³³ the United States Supreme Court further refined the law governing sexual harassment,²³⁴ ruling that a hostile environment must be so severe or pervasive as to change the conditions of the victim's employment.²³⁵

In *Danskine v. Miami Dade Fire Department*,²³⁶ the Eleventh Circuit addressed the validity of a gender-based affirmative action plan under the Equal Protection Clause.²³⁷ The court sustained a county fire department's plan that set a goal of hiring thirty six percent more female firefighters.²³⁸ In this regard, the court made clear that the goal was not a rigid quota and there was no showing that the goal injured male applicants.²³⁹ The court did

228. *Id.*

229. Brad Bennett, *Bias Case Against BSO is Bolstered*, MIAMI HERALD, July 24, 2001, at 1B.

230. *Id.*

231. *Id.*

232. *Id.* at 2B.

233. 121 S. Ct 1508 (2001).

234. *Id.* at 1509; see Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); FLA. STAT. § 703(a)(1).

235. *Clark County Sch. Dist.*, 121 S. Ct. at 1509; see *A Crude Remark by Supervisor Short of Harassment, Court Rules*, MIAMI HERALD, Apr. 24, 2001, at 6A.

236. 253 F.3d 1288 (11th Cir. 2001).

237. *Id.* at 1289.

238. *Id.* at 1299.

239. *Id.* at 1300.

caution the employer that such an affirmative action plan may not go on forever.²⁴⁰

In *E.E.O.C. v. Joe's Stone Crab, Inc.*,²⁴¹ the court found that where an employer systematically barred women from food service positions premised on a sexual stereotype that equated "fine-dining ambience"²⁴² with all-male employees, plaintiff established intentional disparate treatment sex discrimination in violation of Title VII.²⁴³

In *Scelta v. Delicatessen Support Services, Inc.*,²⁴⁴ the court ruled that in analyzing hostile work environment sexual harassment claims under state law,²⁴⁵ courts are bound by federal caselaw governing Title VII.²⁴⁶ Separately, the court also made clear that not all harassment between men and women is automatically discrimination because of sex simply because the words uttered have a sexual meaning.²⁴⁷

A Fort Lauderdale city planner was terminated for creating "a hostile work environment"²⁴⁸ for a woman he supervised by harassing her about her pregnancy and maternity leave.²⁴⁹ In response, the planner claims he was targeted because he is of Philippine descent.²⁵⁰

Broward County's Chief Judge was accused of sexual harassment by a woman who served as an intern ten years ago.²⁵¹ The issue came to light because the woman's husband accused the judge of applying undue pressure on another judge presiding over the couple's divorce.²⁵²

A former Special Agent in the Miami-Dade office of the inspector general sued her boss for sexual harassment.²⁵³

240. *Id.*

241. 136 F. Supp. 2d 1311 (S.D. Fla. 2001).

242. *Id.* at 1313.

243. *Id.*

244. 146 F. Supp. 2d 1255 (M.D. Fla. 2001).

245. See Florida Civil Rights Act, FLA. STAT. § 760.10(1) (2001).

246. *Scelta*, 146 F. Supp. 2d at 1261.

247. *Id.* at 1263.

248. *Lauderdale Dismisses City Planner*, MIAMI HERALD, May 31, 2001, at 3B.

249. *Id.*

250. *Id.*

251. Larry Lebowitz, *Judge Accused of Sex Harassment*, MIAMI HERALD, Aug. 4, 2000, at 1B.

252. *Id.*

253. Joan Fleischman, *Legal Battle Brewing in Inspector General's Office*, MIAMI HERALD, Oct. 4, 2000, at 12B.

4. Age

In *Hipp v. Liberty National Life Insurance Co.*,²⁵⁴ the Eleventh Circuit spelled out the prima facie case for establishing a “pattern and practice”²⁵⁵ claim under the Age Discrimination in Employment Act (ADEA),²⁵⁶ the federal law barring age discrimination.²⁵⁷ In this regard, a plaintiff must show by a preponderance of the evidence that age discrimination was the employer’s “standard operating procedure.”²⁵⁸ To satisfy this burden, plaintiffs must establish more than isolated instances of discriminatory acts.²⁵⁹ Moreover, the court concluded that a constructive discharge can amount to an “adverse employment decision”²⁶⁰ under the Act.²⁶¹ Here, however, plaintiffs failed to show that the supervisor’s acts were so intolerable that a fair minded employee would have felt forced to resign.²⁶²

In *Adams v. Florida Power Corp.*,²⁶³ the Eleventh Circuit ruled that disparate impact claims do not lie under the ADEA.²⁶⁴ In other words, only intentional discrimination claims are cognizable under the Act.

5. Disability

In *Board of Trustees v. Garrett*,²⁶⁵ the United States Supreme Court ruled that Congress exceeded its power under the enforcement provision of the Fourteenth Amendment when it abrogated states’ Eleventh Amendment immunity from suits for damages under the Americans With Disabilities Act (ADA),²⁶⁶ the federal statute prohibiting disability discrimination in employment.²⁶⁷ As a result of this decision, state employees may not sue

254. 252 F.3d 1208 (11th Cir. 2001).

255. *Id.* at 1227.

256. 29 U.S.C. § 623(f)(1).

257. *Hipp*, 252 F.3d at 1227–28.

258. *Id.* at 1227.

259. *Id.* at 1227–28.

260. *Id.* at 1230.

261. *Id.*

262. *Hipp*, 252 F.3d at 1244.

263. 255 F.3d 1322 (11th Cir. 2001).

264. *Id.* at 1326.

265. 121 S. Ct. 955 (2001).

266. 42 U.S.C. § 12101 (Supp. V 1994).

267. *Garrett*, 121 S.Ct. at 967–68.

their state employers for damages for disability discrimination in employment.²⁶⁸

The United States Supreme Court has agreed to hear two ADA cases next term that may have an impact on Florida public employees. One, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,²⁶⁹ addresses the proper definition of disability: is it enough for a court to find that an impairment merely affected, rather than significantly restricted, a major life activity?²⁷⁰

The second case, *United States Airways Inc. v. Barnett*,²⁷¹ addresses whether “reassignment is a reasonable accommodation to which disabled employees should have priority over nondisabled employees”²⁷² in violation of seniority rights.²⁷³

In *Chenoweth v. Hillsborough County*,²⁷⁴ the Eleventh Circuit, interpreting a key provision of the prima facie case of a disabled individual under the ADA, ruled that an inability to drive to work for six months fell short of an impairment drastically curbing a major life activity.²⁷⁵

In *Johnston v. Henderson*,²⁷⁶ the court ruled that post traumatic stress disorder, by itself, does not rise to the level of a “disability” under the ADA.²⁷⁷

A Palm Beach County traffic-light installer sued the county after he was discharged owing to an inability to distinguish between red and green wires.²⁷⁸ The suit claims discrimination on the basis of colorblindness violates the ADA.²⁷⁹

268. See *Connor v. Halifax Hosp. Med. Ctr.*, 135 F. Supp. 2d 1198, 1215 (M.D. Fla. 2001) (reciting “congruence and proportionality” test of Congress’ power to abrogate state’s Eleventh Amendment immunity under enforcement clause of Fourteenth Amendment).

269. 121 S. Ct. 1600 (2001).

270. Linda Greenhouse, *Justices Accept 2 Cases to Clarify Protection for Disabled*, N.Y. TIMES (Miami), Apr. 17, 2001, at A13.

271. 149 L. Ed. 2d 467 (2001).

272. Greenhouse, *supra* note 270, at A13.

273. *Id.*

274. 250 F.3d 1328 (11th Cir. 2001).

275. *Id.* at 1329; see 42 U.S.C. § 12102(2)(A) (1994).

276. 144 F. Supp. 2d 1341 (S.D. Fla. 2001).

277. *Id.* at 1350.

278. *Colorblind Man Sees Red over Pink Slip, Sues County*, MIAMI HERALD, June 29, 2001, at 9B.

279. *Id.*

6. Same-Sex Bias

Broward County's 1995 gay rights ordinance prohibits, among other things, discrimination in employment.²⁸⁰ The ordinance once again was in the news as opponents sought for the third time to overturn it by a petition drive.²⁸¹ This time, however, the Broward Republican Party will remain neutral on the issue.²⁸²

E. Reductions-in-Force

In *Moore v. Navy Public Works Center*,²⁸³ the court addressed whether public employees had standing to challenge the Navy's inaction that could lead to a reduction-in-force.²⁸⁴ The court concluded the plaintiffs failed to meet the constitutional standards for standing²⁸⁵ for the following reasons: 1) no loss of federal employment had taken place; 2) the alleged injury was not concrete or imminent; and 3) no nexus was established between the challenged conduct and the alleged injury.²⁸⁶

In light of a \$6 million revenue shortfall, Hollywood must either increase its property tax rate or layoff "20 police officers, 10 firefighters, 10 public works employees, five building inspectors or code enforcement officers and about 10 other jobs in various city departments."²⁸⁷

F. Remedies for Wrongful Discharge

1. Attorneys' Fees

The United States Supreme Court dealt a blow to civil rights plaintiffs who were formerly entitled to recover attorneys' fees if their lawsuits achieved their aims.²⁸⁸ In *Buckhannon Board & Care Home v. West Virginia*

280. Beth Reinhard, *GOP Sits Out Gay Petition Drive*, MIAMI HERALD, July 17, 2001, at 3B.

281. *Id.*

282. *Id.*

283. 139 F. Supp. 2d 1349 (N.D. Fla. 2001).

284. *Id.* at 1354.

285. *Id.* See U.S. CONST. art. III, § 1.

286. *Moore*, 139 F. Supp. 2d at 1355.

287. Erika Bolstad, *Hollywood Must Cut Jobs or Increase Taxes, Leaders Told*, MIAMI HERALD, May 8, 2001, at 5B.

288. Linda Greenhouse, *Ruling Limits Awarding of Legal Fees for Plaintiffs*, N.Y. TIMES, May 30, 2001, at A18.

Department of Health & Human Resources,²⁸⁹ the Court, in a 5-4 vote, ruled that a plaintiff must achieve an actual courtroom victory or court-approved settlement agreement before recovering attorneys' fees.²⁹⁰

In *Kelley v. Public Employees Relation Commission*,²⁹¹ a Florida appeals court interpreted the meaning of the phrase "a prevailing party"²⁹² for purposes of determining when attorneys' fees are recoverable.²⁹³ Kelley argued the Public Employees Relations Commission (PERC) erred in denying him attorneys' fees and costs since PERC ruled her termination was too severe a sanction and reinstated her.²⁹⁴ At the same time, PERC sustained the public employer's finding that just cause existed to discipline Kelley.²⁹⁵ The court concluded PERC did not abuse its discretion when it denied Kelley her attorneys' fees and costs.²⁹⁶

2. Appeals to the Public Employees Relations Commission

In *City of Jacksonville v. Jacksonville Supervisor's Association, Inc.*,²⁹⁷ the city appealed a final PERC order that the city had committed unfair labor practices in refusing to bargain with the union over a departmental reorganization by the city.²⁹⁸ PERC ruled that the public employer owed a duty to engage in "impact" bargaining about the consequences abolishing bargaining unit positions and promoting employees to supervisory positions would have upon the bargaining unit's wages, hours, and other terms and conditions of employment.²⁹⁹ In essence, PERC viewed the transfer of unit work to the city's non-unit employees as an after effect of translating into action a management decision which must be bargained.

On appeal, the court deemed the issue ill-suited for collective bargaining.³⁰⁰ In support of this position, the court reasoned that the decision to subcontract is mostly a political question best handled in a

289. 121 S. Ct. 1835 (2001).

290. *Id.* at 1843.

291. 781 So. 2d 1193 (Fla. 5th Dist. Ct. App. 2001).

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Kelley*, 781 So. 2d at 1193. (Section 447.203(3) of the *Florida Statutes* gives PERC discretion in awarding attorneys' fees and costs to a prevailing party.)

297. 791 So. 2d 508 (Fla. 1st Dist. Ct. App. 2001).

298. *Id.* at 509.

299. *Id.*

300. *Id.* at 510.

political arena: “[a] public employer should have the authority to decide to change the ‘nature or direction’ of its business, and must be able to freely do so to restructure the organization of its operations.”³⁰¹

In *Hallandale Profession Firefighters, Local 2238 v. City of Hallandale*,³⁰² the union filed a grievance over discipline imposed by the city against three firefighters and demanded arbitration.³⁰³ At the same time, the union filed an unfair labor practice charge with PERC, claiming that the city wrongfully punished the firefighters for engaging in protected activities.³⁰⁴ The hearing officer ruled that the city had cause to sanction the firefighters over the way they handled a 911 call.³⁰⁵ PERC affirmed.³⁰⁶ Later, the union sought arbitration over the same grievance but the trial court ruled that the union was foreclosed from seeking arbitration on the same claims, relying in part on statutory law³⁰⁷ and case law.³⁰⁸

In *Palm Beach County Police Benevolent Ass’n v. City of Riviera Beach*,³⁰⁹ a police union filed an unfair labor practice charge against the city for wrongfully grilling and terminating three police officers for engaging in union activities.³¹⁰ The hearing officer ruled that the police officers were fired for engaging in protected, concerted union activity, including supporting candidates in city elections.³¹¹ PERC remanded the case, instructing the hearing officer to weigh whether the city would have fired the officers regardless of their protected political activity.³¹² On remand, the hearing officer reversed his views, concluding that the union did not meet its burden for proving that the discharge was unlawfully motivated.³¹³ PERC affirmed, and the union appealed.³¹⁴ The district court found that PERC

301. *Id.* at 511.

302. 777 So. 2d 435 (Fla. 4th Dist. Ct. App. 2001).

303. *Id.*

304. *Id.* at 435.

305. *Id.*

306. *Id.*

307. FLA. STAT. § 447.401 (1999).

308. *Hallandale*, 777 So. 2d at 435–36. See *Metropolitan Dade County v. Dade County Ass’n of Firefighters, Local 1403*, 575 So. 2d 289 (Fla. 3d Dist. Ct. App. 1991).

309. 774 So. 2d 942 (Fla. 1st Dist. Ct. App. 2001).

310. *Id.* at 943 (Under section 447.501(1)(a) and (b) of the *Florida Statutes*, public employees may engage in protected, concerted union activities.)

311. *Id.*

312. *Id.* at 944.

313. *Id.*

314. *River Beach*, 774 So. 2d at 944.

erred in remanding the case because the hearing officer's findings of fact were supported by substantial evidence and he applied the correct law.³¹⁵

IV. PUBLIC SECTOR, COLLECTIVE BARGAINING ISSUES

A. Public Unions

About 434,000 Florida employees belonged to a union in 2000, about 6.8% of the state's 6.26 million workers, an increase from 6.5% who belonged to a union in 1999.³¹⁶ Local government workers, together with service workers, account for much of the union growth.³¹⁷

B. Collective Bargaining Issues

In *Florida Senate v. Florida Public Employees Council 79, AFSCME*,³¹⁸ the Supreme Court of Florida addressed the respective roles of the legislature and the courts in the face of a collective bargaining impasse between the union representing state employees and the governor in his role as public employer.³¹⁹ When the legislature scheduled a public hearing to resolve the impasse, the circuit court issued a temporary restraining order (TRO), barring it from holding the hearing.³²⁰ On appeal, the state supreme court, invoking separation of powers principles, quashed the TRO.³²¹

About 3100 unionized pharmacists and registered nurses at Jackson Memorial Hospital ratified a three year collective bargaining agreement that includes a nineteen percent to twenty seven percent pay increase over the life of the contract.³²² The agreement, approved by the union representing the public employees, must now be approved by the Public Health Trust's board of trustees and the Miami-Dade Commission.³²³ The contract will increase

315. *Id.*

316. Joan Fleischer Tamen, *Labor Tug-of-War Swells Throughout S. Florida*, SUN-SENTINEL (Ft. Lauderdale), Feb. 25, 2001, at 1F.

317. *Id.*

318. 784 So. 2d 404 (Fla. 2001).

319. *Id.* at 406.

320. *Id.*

321. *Id.* at 409. Impasse resolution mechanisms are outlined in section 447.403 of the *Florida Statutes*.

322. James McNair, *Union Ratifies Hospital Pact*, MIAMI HERALD, Apr. 25, 2001, at 1C.

323. *Id.*

nurses hourly wages by five dollars an hour.³²⁴ The hospital is struggling to recruit and retain nurses and pharmacists.³²⁵

Student performance, as a method of evaluating public school teachers, has been a key bone of contention between the Broward school district and its teachers union.³²⁶ Recently, the district's method of assessing its teachers was ruled out of compliance with state law, according to officials from the Florida Department of Education.³²⁷

C. Arbitration

The United States Supreme Court handed down a 5-4 decision that may have an impact on public employees. In *Circuit City Stores v. Adams*,³²⁸ the court ruled that employers can insist that employment disputes go to arbitration rather than to court.³²⁹ In response, dozens of members of Congress introduced the Preservation of Civil Rights Protection Act of 2001, aimed at prohibiting employers from forcing workers to give up their rights in courts, unless the employee freely opts for arbitration after the dispute arises. Arbitration clauses in employment contracts usually govern nonunion workers who agree to them as a condition of employment.

VI. CONCLUSION

Public sector employment and labor law ranges far and wide. Every stage of employment, from hiring, to the terms of employment, to employment discrimination, to discipline and discharge raises its own set of issues at the federal, state and local levels. Post-retirement also covers such issues as public pensions, disability retirement, death benefits, set-offs from social security and workers' compensation. Unlike the private sector which commonly is left alone by the news media, public sector employment comes under exacting scrutiny by local news sources. From these sources, a wealth of information on public employment informs this area of the law.

324. *Id.*

325. *Id.*

326. Susan Ferrechio, *Broward Teacher Rating System Flunks*, MIAMI HERALD, Aug. 23, 2000, at 3B.

327. *Id.*

328. 532 U.S. 1302 (2001).

329. *Id.* at 235.