

# the checkoff

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The Labor & Employment Law Section

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## Department of Labor Proposes New Overtime Rules

by Raquel Elejabarrieta, Esq.

On March 28, 2003, the Department of Labor proposed a drastic overhaul of the 1938 Fair Labor Standards Act's overtime pay requirements affecting nearly 22 million Americans. The Fair Labor Standards Act, also known as the FLSA or wage and hour law, sets the minimum age, restricts child labor, and mandates overtime. These changes are of particular importance to Florida, specifically South Florida, because South Florida leads the nation in number of lawsuits filed by workers against their employers under the FLSA.

The proposed changes include two key elements: an increase in the salary threshold for employees not entitled to overtime

and new definitions on the type of jobs and industries in which employees qualify for overtime. These proposed revisions would guarantee overtime payments to 1.3 million low wage employees, disqualify thousands of white collar employees earning more than \$22,100 a year, and give clarification to millions of employees whose pay status is now uncertain.

Currently, an employee earning only \$155 a week can qualify as a "white collar" employee not entitled to overtime pay. The proposal raises that salary threshold to \$425 a week or \$10.62 an hour. This change is likely to benefit most assistant managers

See "New Overtime Rules" page 9

## An Update on the Enforcement of Restrictive Covenants by an Assignee or Successor under Florida Law

by Scott Silverman

Section 542.335(f), Fla. Stat., provides that "a court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided . . . in the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor." Although the statutory language suggests that a corporate entity that did not actually contract with the former employee may not enforce a restrictive covenant where the covenant does not expressly authorize enforcement by an assignee or successor, in *Corporate Express*

*Office Prods., Inc. v. Phillips*, 2003 Fla. Lexis 521 (Fla. April 17, 2003), the Florida Supreme Court held that there are limited circumstances in which enforcement will be permitted.

As explained below, although this decision was rendered pursuant to the predecessor statute, Section 542.33 (1985), it has equal application to cases arising under the amended statute, Section 542.335 (1996). Accordingly, counsel who are called upon to assess enforceability questions with respect to contracts entered both before and after the effective date of the amended statute must understand the background and holding of this important case.

see "Restrictive Covenants," page 9

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# Chair's Report



In February 2003, the Labor & Employment Law Section held a Long Range Planning Retreat for members of the Executive Council and Committee Chairs. This was the third bi-annual retreat, and was held

in conjunction with the Section's certification review program in Orlando.

I want to thank all of the Section members who took a Saturday off from their busy schedules to participate in the retreat. The limits of traditional Executive Council meetings simply do not permit the kind of deliberation and discourse necessary to effect any major changes in the direction the Section needs to take to be of maximum service to its members. I want to extend special thanks to Cary Singletary, Dave Linesch and the rest of the Long Range Planning Committee, who undertake the responsibility for making the retreat a reality. Cary was a primary architect of the very first retreat and has continued to spearhead the effort for the last two as well. I am also grateful to Lisa Gunther, who has *endured* our high-spirited debate for three retreats and four years.

One of the primary results of the 2003 retreat was a resolution to reorganize the Section's committee structure. The bulk of the Section

committees have always been defined by substantive legal/practice areas: EEO; Labor Relations; Litigation/ADR; Individual Rights; Employee Benefits; Legislative; and Federal Labor Standards. While these committees were modified in recent years to more accurately reflect the practice trends of our growing Section, the substantive "topic" delineation continued. Unfortunately, our committee structure has not fostered greater innovation and involvement in the Section. In an attempt, to expand involvement and resources, we are working on reorganizing the committee structure to reflect task/action-plan descriptions based upon each committee's function.

What we have observed in the past is that committees created around a fairly concrete task, such as the original certification subcommittee, the website subcommittee, and of course the CLE committee, accomplished the most and created the best opportunity for newer members. In contrast, when I attempted to appoint "fresh faces" to co-chair substantive law committees, I could not give a satisfactory answer to "what does that committee do?"

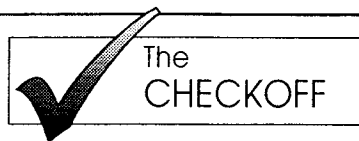
In order to provide a better answer to that question for future outreach efforts, I have solicited and received a number of thoughtful suggestions for task-based committees. Principal among these is to retain our CLE, website and publications committee,

perhaps under the auspices of an overarching Legal Education Committee. Tracking and reporting substantive law developments would still have a role within this committee. The difference, hopefully, would be that the information offered would be easily accessible to the *entire* Section membership instead of just the committees and Executive Council. In addition, we will likely retain our special projects committee as a proving ground for innovative ideas/projects and a catchall for dealing with issues-of-the-day like EPLI and unauthorized practice of law issues.

There have been many excellent suggestions for new committees tasked to work with the ABA, local Bars (many of which have Labor & Employment committees of their own) and law schools. In the same vein, we will continue our outreach to the judiciary through our Judicial Education Committee. Finally, we will consider a committee devoted exclusively to expanding member involvement and perhaps charged with membership surveys, "new member" receptions, and a mentoring program.

We still have much work to do to make this new structure a reality, and a functional one at that! Nevertheless, I am excited about the prospect of launching this new effort to expand the role of the Section for its members.

— Courtney B. Wilson, Chair



The Checkoff is prepared and published by the Labor and Employment Law Section of The Florida Bar.

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# Supreme Court Strikes Down Secretary's Automatic Penalty for Failing to Designate Leave as FMLA Leave

by Jennifer Fowler-Hermes

Enacted in 1993 to promote the stability and economic security of families, the Family and Medical Leave Act ("FMLA") guarantees eligible<sup>1</sup> employees twelve (12) weeks of unpaid leave in a one (1) year period.<sup>2</sup> An eligible employee may take FMLA leave for one or more of the following reasons: for the birth of the employee's child; the placement of a child with the employee for adoption or foster care; to care for a parent, child or spouse with serious health conditions<sup>3</sup>; and, when the employee suffers from a serious health condition.<sup>4</sup> The 12 week leave period is the maximum required by the FMLA,<sup>5</sup> and employers may require that employees use any accrued paid leave as part of their 12 week FMLA entitlement.<sup>6</sup> During the leave period, employers are required to maintain coverage under any group health plan that the employee would have been entitled to if she did not take leave.<sup>7</sup> At the end of an employee's leave, employers have a duty to reinstate the employee if she is able to return to work.<sup>8</sup> Employers are prohibited from interfering with employees' exercise of their FMLA rights and discriminating against employees who exercise their rights.<sup>9</sup>

Congress afforded the Secretary of Labor the authority to issue regulations necessary to carry out the FMLA.<sup>10</sup> Pursuant to this authority, the Secretary has issued regulations directing employers on how to administer the FMLA.<sup>11</sup> Generally, courts give the Secretary's regulations considerable deference.<sup>12</sup> However, such deference has limits: A regulation cannot stand if it is arbitrary, capricious, or manifestly contrary to the statute.<sup>13</sup> In the past few years, there has been a considerable divergence of opinion over whether the Secretary exceeded her authority when enacting regulations that require employers to provide individual notice to employees that leave will be designated as FMLA leave<sup>14</sup> and penalize employers for failing to timely

provide this notice.<sup>15</sup>

On March 19, 2002, in *Ragsdale, et al. v. Wolverine World Wide, Inc.*,<sup>16</sup> the Supreme Court set the record straight with respect to 29 C.F.R. §825.700(a), the regulation denying employers any credit for leave granted before an employee is provided notice that her leave will be designated FMLA leave. It held that the regulation is not a valid exercise of the Secretary of Labor's authority. The Court found that this regulation is not only inconsistent with Congressional intent, but also establishes sanctions that are unconnected to any impairment suffered by the employee.<sup>17</sup>

Tracy Ragsdale ("Ragsdale") began her employment with Wolverine World Wide, Inc. ("Wolverine"), a shoe factory, on March 17, 1995.<sup>18</sup> In February 1996, she was diagnosed with Hodgkins disease and had to undergo surgery and months of radiation treatment.<sup>19</sup> Wolverine's leave policy allows employees with six months of service, to take leave for up to seven months. On February 21, 1996,

Ragsdale requested and was granted a one month leave.<sup>20</sup> On March 18, April 22, May 21, June 20, July 22 and August 15, 1996, she requested and received one month extensions of her leave.<sup>21</sup> During Ragsdale's leave, Wolverine held her position and, for six out of the seven months she was on leave, it maintained her health benefits and paid her health insurance premiums.<sup>22</sup> However, Wolverine failed to notify Ragsdale of her FMLA eligibility or of her right to have her leave designated as FMLA.<sup>23</sup>

On September 20, 1996, when Ragsdale exhausted her leave entitlement under Wolverine's leave policy and was unable to return to work she was terminated.<sup>24</sup> On September 26, 1996, Ragsdale requested additional FMLA leave or in the alternative permission to work on a part-time basis. Wolverine denied her request. On December 22, 1996, Ragsdale filed suit against Wolverine setting forth claims under the FMLA, ADA and Arkansas Act (Ark. Code

*continued, next page*

## Next Edition of *Checkoff* To Honor Dean Vause

On May 9, 2003, Gary Vause, Dean and Vice President of Stetson University College of Law, renowned legal scholar and long-time friend to the Labor and Employment Section died from cancer. Dean Vause was 60.

While everyone within the Section has indirectly benefited from Dean Vause's dedication and contributions, many Section members had direct and significant contact with and assistance from Dean Vause over the years. The next edition of the *Checkoff* will have a space reserved for anyone wishing to contribute any comments (long or short) about Dean Vause, his contributions and his legacy. In addition, the next *Checkoff* will be dedicated to Dean Vause.

Anyone interested in contributing to this cause should call or email Michael Spellman at (850) 891-8554 or [spellmam@talgov.com](mailto:spellmam@talgov.com). The deadline for contributing comments is July 28, 2003.

## COURT STRIKES DOWN

from preceding page

§16-123-101, *et seq.*).<sup>25</sup> Ragsdale claimed that because Wolverine had not provided her with individualized notice that any portion of her 30 week leave, provided for by Wolverine's leave policy, was designated as FMLA leave, she was entitled to an additional 12 weeks of leave. Thus, she was claiming that due to Wolverine's failure to designate, she should have a total of 42 weeks of leave. Wolverine successfully moved for summary judgment on Ragsdale's FMLA claim, asserting that 29 C.F.R. §825.700(a), constitutes an "erroneous interpretation of the FMLA."<sup>26</sup>

Ragsdale appealed and on July 11, 2000, the Eighth Circuit Court of Appeal affirmed the district court's decision.<sup>27</sup> The Eighth Circuit Court, following the Eleventh Circuit's precedent in *McGregor*, 180 F.3d at 308, found that the text of the FMLA did not contemplate that an employer would be required to provide more than 12 weeks of leave.<sup>28</sup> Noting that in some circumstances 29 C.F.R. §825.700(a) requires employers to provide more than 12 weeks of leave, it determined that the regulation is an impermissible interpretation of the FMLA and "must be struck down."<sup>29</sup> Ragsdale petitioned for certiorari. Certiorari was granted on June 25, 2001.<sup>30</sup>

The Supreme Court's review of the case focused only on the penalty for failing to comply with the Secretary's additional notice requirements.<sup>31</sup> It did not address whether the additional, individualized,<sup>32</sup> notice requirement, set forth in 29 C.F.R. §825.208, is a valid exercise of regulatory authority.<sup>33</sup> Ragsdale argued that §825.700(a) reflects the Secretary's understanding that when an employer fails to comply with the designation requirement, it could deny, restrain or interfere with an employee's FMLA leave rights.<sup>34</sup> Her argument, which is adopted by the dissent,<sup>35</sup> is that the designation requirement "facilitates leave planning, allowing employees to organize their health treatments or family obligations around the total amount of leave that will ultimately be provided."<sup>36</sup>

The majority agreed that a failure to provide notice of a designation may interfere with an employee's FMLA leave rights, but found "the more extreme [position] embodied in 825.700(a) is not [reasonable] . . . . The regulation establishes an irrefutable presumption that the employee's exercise of FMLA rights [is] impaired [by a failure to designate] and that the employee deserves 12 more weeks."<sup>37</sup> The majority explained how this presumption "relieves employee's burden of proving any real impairment of their rights and resulting prejudice."<sup>38</sup> Calling this a

"regulatory slight of hand" the Court opined that the effect of the regulation was to run around important limitations of the statute's remedial scheme and thus alter the FMLA in a fundamental way.<sup>39</sup>

By its nature, the remedy created by Congress requires retrospective, case-by-case examination the Secretary now seeks to eliminate . . . [The Secretary also seeks] to amend the FMLA's most fundamental substantive guarantee, the employee's entitlement to a total of 12 work weeks during any twelve month period.<sup>40</sup>

Further, the Court theorized that the regulation could cause employers to discontinue plans that provide more generous benefits than provided for by the FMLA.<sup>41</sup> Such a result is contrary to §2653 of the FMLA, which encourages employers to provide more than the statute requires.

The Court held that §825.700(a) exceeded the Secretary's authority to issue regulations to carry out the FMLA, as it "effects an impermissible alteration" of the FMLA.<sup>42</sup> Although this decision is a victory for employers, it does not eliminate the administrative procedures employers must follow. Accordingly, designation forms should still be provided to employees and employers should not wait to designate.

*Jennifer Fowler-Hermes is an associate with Kunkel, Miller & Hamant, representing management in employment related disputes. Ms. Fowler-Hermes received both her Bachelor of Arts (1994 with highest honors) and her Juris Doctorate (1997) from the University of Florida.*

### Endnotes:

<sup>1</sup> An employee is eligible for FMLA leave if she has worked for a covered employer for at least 1,250 hours during the preceding twelve months and worked for the employer for at least 12 months. See 29 U.S.C. §2611(2)(A). A covered employer is "any person engaged in commerce or in an industry affected commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." See 29 U.S.C. §2611(4)(A)(i). The Department of Labor takes the position that all smaller employers who lease their employees are covered. See 29 C.F.R. §825.106. Some practitioners feel that this is another example of the Secretary exceeding her authority. All public employers are covered. See 29 U.S.C. §2611(4)(A)(iii).

## WANTED: ARTICLES

The Section needs articles for the *Checkoff* and the *Bar Journal*. If you are interested in submitting an article, contact either Michael Spellman (850/891-8554) or ([SpellmaM@talgov.com](mailto:SpellmaM@talgov.com)) or Stuart Rosenfeldt (954/522-3456) or ([srosenfeldt@rrdplaw.com](mailto:srosenfeldt@rrdplaw.com)) to confirm that your topic is available.

## REWARD: \$150\*

[\*For each published article, a \$150 scholarship to any section CLE will be awarded.]

Article deadline for next Checkoff is July 28 2003.

<sup>2</sup> See 29 U.S.C. §2612(a)(1).

<sup>3</sup> A serious health condition is "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider." 29 U.S.C. §2611(11)(A)&(B).

<sup>4</sup> See *Id.*

<sup>5</sup> "The total of 12 workweeks leave [] represents a carefully crafted compromise by Congress as to the total amount of leave available to employees." See Brief on the Merits for Respondent, 2000 US Briefs 6029, \*4 [All citations to briefing on this matter are LEXIS citations]; see also *Ragsdale, et al. v. Wolverine World Wide, Inc.*, \_\_\_ S. Ct. \_\_\_, 2002 U.S. LEXIS 1936, \*23-24 (March 19, 2002)(citing H.R. Rep. No. 102135, pt 1, p. 37 (1991)).

<sup>6</sup> See 29 U.S.C. 2612(2)(A).

<sup>7</sup> See 29 C.F.R. §2614(a).

<sup>8</sup> See 29 C.F.R. §2614(c).

<sup>9</sup> See 29 U.S.C. §2615.

<sup>10</sup> See 29 U.S.C. §2654.

<sup>11</sup> See 29 C.F.R. §825.100, et seq.

<sup>12</sup> See *Ragsdale*, 2002 U.S. LEXIS 1936, \*10 (citing *United States v. O'Hagan*, 521 U.S. 642, 673 (1997)).

<sup>13</sup> See *Id.*

<sup>14</sup> See 29 C.F.R. §§825.208(a)&(c) and 825.301(c).

<sup>15</sup> See 29 C.F.R. §825.700(a). The following cases support the Secretary's authority: *Plant v. Morton Int'l, Inc.*, 212 F.3d 929 (6<sup>th</sup> Cir. 2000); *Ritchie v. Grand Casinos of Mississippi, Inc.*, 49 F.Supp. 2d 878 (S.D. Miss. 1999); and, *Chan v. Loyola Univ. Med. Ctr.* 1999 U.S. Dist. LEXIS 18456 (N.D. Ill. 1999). The following cases do not support the Secretary's authority: *McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11<sup>th</sup> Cir. 1999); *Schloer v. Lucent Tech., Inc.*, 2000 U.S. Dist. LEXIS 10146 (D. Md. 2000); *Neal v. Children's Habilitation Ctr.*, 1999 U.S. Dist. LEXIS 14762; and, *Donnellan v. New York City Transit Auth.*, 1999 U.S. Dist. LEXIS 11103 (S.D.N.Y. 1999).

<sup>16</sup> See *Id.* at \* 16-17.

<sup>17</sup> See *Id.* at \* 18, 28.

<sup>18</sup> *Ragsdale* had not completed 12 months of service with Wolverine when she first requested leave. However, under Wolverine's leave policy, she was entitled to non-FMLA leave because she had been with the Company for six months. See *Ragsdale, et al. v. Wolverine World Wide, Inc.*, 218 F.3d 933, 935 (8<sup>th</sup> Cir. 2000).

<sup>19</sup> See *Id.*

<sup>20</sup> See *Id.* Pursuant to Wolverine's leave policy, leave was given on a month-to-month basis.

<sup>21</sup> See *Id.*

<sup>22</sup> See *Id.* at 940.

<sup>23</sup> See *Id.* at 935-36. Wolverine did not provide *Ragsdale* with notice because it did not believe she was eligible for FMLA leave because she had not been employed for twelve months when her leave began. See Brief on the Merits for Respondent (*Wolverine*), 2000 US Briefs 6029.

<sup>24</sup> See *Id.* at 935.

<sup>25</sup> See *Id.* *Ragsdale* was not released to return to work until December 2000.

<sup>26</sup> See *Id.* Wolverine also moved for summary judgment on the grounds that *Ragsdale* had never been eligible for FMLA leave. See Brief on the Merits for the Petitioner, 2000 US Briefs 6029, \*4-5. The court rejected this argument finding that *Ragsdale* became eligible for FMLA leave on the first anniversary of her employment with Wolverine, even though she was on leave the month before her anniversary date. See *Id.* This issue was not addressed on appeal. However, assuming that the district court was correct in counting *Ragsdale's* month of leave in determining whether she was employed for twelve months, the consequence will prove problematic for employers allowing leave before an employee has worked for twelve month. Any leave taken by an employee prior to the anniversary date cannot be counted as FMLA qualifying leave,

as FMLA leave entitlement does not begin until the anniversary date.

<sup>27</sup> *Id.* at 935.

<sup>28</sup> *Id.* at 938.

<sup>29</sup> *Id.* at 939. Wolverine had requested that both 29 C.F.R. §§825.208(c) and 825.700(a) be stricken. §825.208(c) applies only to paid leave where §825.700(a) covers both paid and unpaid leave. The court ruled only on the validity of §825.700(a). See Brief on the Merits for the Respondent at n.2.

<sup>30</sup> *Ragsdale v. Wolverine World Wide, Inc.*, 533 U.S. 928 (2001)

<sup>31</sup> See *Id.*; *Ragsdale*, 2002 U.S. LEXIS 2002, \*10.

<sup>32</sup> Employers are required to tell an employee taking leave that her absence will be considered FMLA leave. In addition §825.301(c), requires written notice of the same along with detailed information concerning the employee's rights and responsibilities under the act "within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible."

<sup>33</sup> It assumed the additional notice requirements placed on employers by the Secretary were valid. See *Id.*

<sup>34</sup> Justices O'Connor, Souter, Ginsburg & Breyer.

<sup>35</sup> See *Id.* at \* 16-17 and 31. In support of *Ragsdale*, the Government asserts that the categorical penalty found in the regulations is easier to administer than any fact-specific inquiry. See *Id.* at \* 19; Brief for the United States as Amicus Curiae Supporting Petitioners, 2000 U.S. Briefs 6029.

<sup>36</sup> Justices Kennedy, Rehnquist, Stevens, Scalia and Thomas.

<sup>37</sup> *Id.* at \* 17.

<sup>38</sup> *Id.* at \* 18.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \* 19 and 23.

<sup>41</sup> *Id.* at \* 26.

<sup>42</sup> *Id.* at \* 28

## In Memoriam: Irving Miller

by Stanley Kiszkiel

Irving Miller, a long time member of the Labor and Employment Law Section, passed away on March 26, 2003, as a result of complications following brain surgery. He was 63 years old.

Although Mr. Miller had a distinguished career before settling in Florida, he was best known here for his service as Regional Attorney for the Equal Employment Opportunity Commission's Miami District Office and his 18 years with Akerman Senterfitt in Miami. Just prior to his death, Mr. Miller had joined Duane Morris.

Mr. Miller had a reputation as a

wonderful man who also was an excellent attorney. These traits allowed him to attract and retain clients and zealously advocate without personal animosity towards his opponents. As a result, both the plaintiff's and defendant's bars appreciated him.

In addition to his service to the Labor and Employment Law section, Mr. Miller was a past member of the Florida Board of Bar Examiners and was active in the Black Lawyers Association of Dade County. He served as vice president of the Black Lawyers Association in 1989 and 1990.

Mr. Miller is survived, and will be missed, by his former wife, two chil-

dren, two brothers and a sister, and all of the members of The Florida Bar.

*Stanley Kiszkiel is a shareholder in the law firm of Whelan, DeMaio & Kiszkiel, P.A. Until he left to pursue private practice in December 1995, Mr. Kiszkiel served as Regional Attorney for the Equal Employment Opportunity Commission's Miami District Office for five years. He also served as a trial attorney and supervisory trial attorney in the EEOC's Miami office. Mr. Kiszkiel graduated from Villanova University and received his law degree, summa cum laude, from the Ohio State University College of Law.*



# CASE SUMMARIES

## Eleventh Circuit

*Hall v. Moffett*, (11th Cir. March 28, 2003)

Disparities in qualifications on paper between plaintiff and white applicants were not so apparent to support a claim that race was a motivating factor for decision to hire white applicant. In addition, plaintiff's pattern and practice theory that the legacy of white supremacy in Alabama resulted in a standard operating procedure and policy of not appointing black superintendents in majority white school districts was rejected.

*Musnick v. King Motor Co. of Ft. Lauderdale*, (11th Cir. March 28, 2003)

Arbitration agreement not unenforceable merely because it may involve "fee-shifting." Party seeking to void agreement must offer evidence that the amount of fees likely to be incurred and the inability to pay those fees.

*Watson v. Blue Circle, Inc.* (11th Cir. March 21, 2003)

Incidents of sexual harassment which are outside the 180 day time frame for filing an EEOC charge may be considered part of one action if additional incidents occurred within 180 day time frame, and district court erred in entering summary judgment where genuine factual issues existed regarding whether employer had notice of alleged incidents of harassment and whether employer had effective anti-harassment policy.

*Wood v. Green*, (11th Cir. March 13, 2003)

Requests for leaves of absence for indefinite time period are not a reasonable accommodation under the ADA. Basing the potential time period for the leave of absence upon the prior history of Plaintiff's absences is too speculative and not adequate to show reasonableness.

*Morrison v. Amway Corp.*, (11th Cir. March 5, 2003)

Case reversed and remanded to district court to reconsider motion to dismiss FMLA claim on basis that plaintiff was not "eligible employee", since motion implicated both jurisdiction and underlying merits, and motion should have been reviewed under standard applicable with Rule 56 motion, following *Garcia v. Copenhagen, Bell & Assoc.*, 104 F.3d 1256 (11th Cir. 1997), and rejecting *Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999).

*De Leon v. Comcar Industries, Inc.*, (11th Cir. February 18, 2003)

Plaintiff was estopped from continuing with discrimination suit due to his failure to disclose potential recovery from same in contemporaneous bankruptcy proceeding.

*Downing v. Board of Trustees of Univ. of Alabama-Birmingham*, (11th Cir. February 13, 2003)

Same-sex sexual harassment is regarded as the same as opposite-sex sexual harassment and is hence protected under the Equal Protection Clause. Therefore, 11th Amendment immunity does not attach to the harassment claim itself nor to the retaliation claims which stem from such harassment.

*Wright v. AmSouth Bancorporation*, (11th Cir. February 5, 2003)

Time for filing an EEOC charge of discrimination begins to run when the claimant is unequivocally on notice of the discriminatory action even though the employee sensed it was eminent. Potential action on the part of an employer is not enough for the EEOC to investigate, as such an investigation would be an investigation of hypothetical discrimination. The court also held that a request which sought all word processing files created, modified and/or accessed by or on behalf of certain employees was too broad, unduly burdensome and not relevant, as discovery in not without its limits in Title VII actions.

*Ares v. Manuel Diaz Farms, Inc.*, (11th Cir. January 17, 2003)

Where two related corporations

are dependent upon one another for their own existence and one is clearly meets the definition of an agricultural operation, the other may also be so classified for purposes of the agricultural exemption for overtime pay. Looking to the Second Circuit for guidance the court stated, "the availability of the agricultural exemption should not turn upon the technicalities of corporate organization." (*citing, Wirtz v. Jackson & Perkins*, 312 F.2d 48, 50 (2d Cir. 1963)).

*Steger v. General Elec. Co.*, (11th Cir. January 17, 2003)

Employer presented adequate evidence to support "same decision" affirmative defense by showing layoff decisions were made based upon economic necessity, the reorganization of the collections department, a comparison of Plaintiff's performance with that of her co-workers. The court also found that the exclusion of a potentially sexist comment was proper as the statement was not made by a decision maker in the layoff process.

*Watts v. BellSouth Telecommunications, Inc.*, (11th Cir. January 3, 2003)

Plaintiff is not required to exhaust administrative remedies where the ERISA plan summary would lead a reasonable participant to believe such exhaustion was not mandatory.

*Mousa v. Lauda Air Luftfahrt, A.G.*, (S.D. Fla. March 31, 2003)

In order to be considered "employee" within meaning of Title VII, individual must work in the United States for each working day in each of twenty or more calendar weeks during the relevant time period, and thus, foreign citizens who were based abroad and worked for airline exclusively outside the United States were not included within Title VII's fifteen-employee jurisdictional count.

*Santana v. Blue Ribbon Meats, Inc.*, (S.D. Fla. March 4, 2003)

In ADEA reduction-in-force case, comments by non-decisionmaker, made 2 years before layoffs, including statement "to tell the old lady (one of the plaintiffs) that she could

not eat in the Box Room" was not probative of discriminatory intent and did not constitute direct evidence of discrimination.

*Cantrell v. Jay R. Smith Mfg. Co.*, (M.D. Ala. March 3, 2003)

Alleged negative actions including having duties changed, being required to report to different supervisor, not being provided necessary training, tools or software and having negative job performance memoranda placed in her file did not constitute materially adverse employment actions as required for a prima facie case of retaliation.

*Norrell v. Waste Away Group, Inc.*, (M.D. Ala. February 26, 2003)

Pretext could not be established in failure to promote case even though supervisor made allegedly discriminatory statements about women in the workplace, including queries whether plaintiff would return to work after birth of her second child or whether female employees could travel in spite of having

young children.

*LeBlanc v. City of Tallahassee*, (N.D. Fla. February 24, 2003)

Annual merit pay increases are separate and discrete acts. A charge of discrimination not filed within 300 days of the increase is time barred. Plaintiff was not able to overcome Defendant's extensive and detailed evidence of racially-neutral pay increases which were not time barred.

*Ikejiani v. Dade County Public Health Trust*, (S.D. Fla. February 18, 2003)

Plaintiff was unable to show Defendant's legitimate non-discriminatory reasons for terminating him were pretext. Defendant demonstrated that Plaintiff's aggressive behavior toward his supervisor who was confined to a wheelchair was in violation of several employee and hospital policies and warranted dismissal.

*Reed v. Mobile County School Sys.*, (S.D. Ala. February 13, 2003)

Neither transcript from television program nor affidavit of retired investigator with Department of Labor's Wage and Hour Division provided sufficient evidence to demonstrate that school system had a "pattern and practice" of failing to pay earned overtime, such as to satisfy conditional class certification requirement.

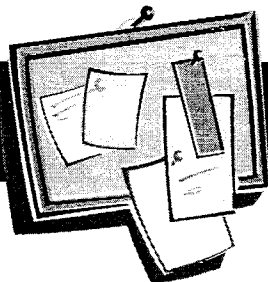
*Debrecht v. Osceola County*, (M.D. Fla. February 7, 2003)

Battalion chiefs for emergency services department were exempt from FLSA overtime provisions since county demonstrated that they were paid on salary basis and qualified as administrative, as well as executive, employees.

*NLRB v. Point Blank Body Armor, Inc.*, (S.D. Fla. January 30, 2003)

Delay in filing petition for injunction under sec. 10(j) of the National Labor Relations Act is not determinative of whether relief should be granted. Where an employer's past practices lead to belief that additional retribution is eminent, the is-

*continued...*



## Section Bulletin Board

### SEMINARS

#### **Public Employment Labor Relations Forum (5398R)**

October 23 - 24, 2003  
Hyatt Regency Orlando Airport, Orlando

#### **Discrimination Litigation Seminar (5397R)**

November 14, 2003  
Coconut Grove

#### **Labor Certification Review(5391R)**

February 19 - 20, 2004  
The Rosen Plaza, Orlando

#### **Advanced Labor Topics (5396R)**

April 30 - May 1, 2004  
Key West

### EXECUTIVE COUNCIL MEETINGS

#### **Thursday, October 23, 2003 - Orlando**

5:00 p.m. - 5:15 p.m. Joint Meeting  
5:15 p.m. - 6:15 p.m. Labor Meeting  
6:00 p.m. - 7:30 p.m. Reception

#### **Thursday, November 13, 2003 - Coconut Grove**

5:00 p.m. - 6:00 p.m. Meeting  
6:00 p.m. - 7:30 p.m. Reception  
7:30 p.m. - 8:30 p.m. Dinner

#### **Thursday, February 19, 2004 - Orlando**

5:00 p.m. - 6:00 p.m. Meeting  
6:00 p.m. - 7:30 p.m. Reception  
7:30 p.m. - 8:30 p.m. Dinner

#### **Friday, April 30, 2004 - Key West**

5:15 p.m. - 6:15 p.m. Meeting  
6:15 p.m. - 7:30 p.m. Reception  
7:30 p.m. - 8:30 p.m. Dinner

## CASE SUMMARIES

from page 7

suance of an injunction is just and proper.

*Gaddis v. Russell Corp.*, (M.D. Ala. January 22, 2003)

Plaintiff's claims that employer (1) denied ability to carry over vacation time in spite of white employee being allowed to do so, (2) opposed employee's request for unemployment benefits, and (3) denied employee's transfer requests did not constitute adverse employment actions or show disparate treatment.

*Tillery v. ATSI, Inc.*, (N.D. Ala. January 15, 2003)

Fact question as to whether conduct of company owner towards employee, which included lecturing employee about her prospects of salvation during working hours, making highly personal inquiries

into her private life, and strongly suggesting that she talk with God, was such that a reasonable person could have found the environment to be religiously hostile and abusive, and precluded summary judgment.

## Florida Courts

*Coastal Florida Police Benevolent Assoc., Inc. v. Williams*, (Fla. January 30, 2003)

Deputy sheriffs are public employees, and therefore, have the right to collectively bargain under the Florida Constitution, as there is no compelling interest to deny deputies such right.

*Dolega v. School Board of Miami-Dade County*, (Fla. 3d DCA March 26, 2003)

Teacher's refusal to comply with requirement of preparing emergency lesson plans in case of her absence

constituted willful neglect and insubordination.

*Dade County School Admin. Assoc. Local 77, AFSA, AFL-CIO v. School Board of Miami-Dade County*, (Fla. 3d DCA March 13, 2003)

Upholding PERC's decision to dismiss assistant principals' petition to bargain collectively pending a determination by a circuit court as to the constitutionality of §§ 447.203 (4)(a)6. and 228.041(10), *Fla. Stat.* (2002), thereby presenting a record by which the appellate court can consider the issues raised by the petitioner.

*Zelaya v. Atrim Electric, Inc.*, (Fla. 3d DCA March 5, 2003)

Despite inability to produce time records, plaintiff must be given an opportunity to offer proof that he worked overtime and was improperly compensated, thus precluding summary judgment.

*New World Communications of Tampa, Inc. v. Akre*, (Fla. 2d DCA February 14, 2003)

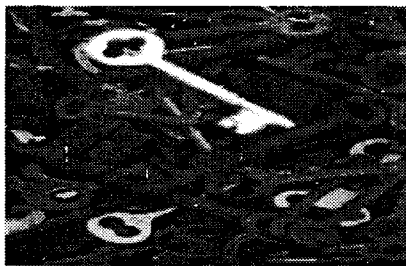
Plaintiff could not maintain an action for whistle-blower retaliation where the "law" which she was threatening to report to FCC that her employer was violating was not a law or an adopted rule.

*Nastase v. Florida Fish and Wildlife Conservation, etc.*, (Fla. 5th DCA January 31, 2003)

Summary judgment properly granted where Commission was not a proper party, nor a "successor" agency, where plaintiff had been an employee of the Department of Environmental Protection, and had never been an employee of Commission.

*The University of Florida, Board of Trustees v. Sanal*, (Fla. 1st DCA January 29, 2003)

Where university did not establish that physician had provided care for any of university's former patients in his new employment, or that physician had interfered with university's substantial interest in a particular prospective patient, trial court properly found that physician was not causing irreparable injury to university's legitimate business interests.



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## NEW OVERTIME RULES

from page 1

at hotels, stores, or restaurants who work 50 to 60 hours per week and earn less than \$22,100 a year. Under the proposal, the minimum wage "floor" for hourly computer employees would remain unchanged (\$27.63 per hour) and outside sales employees would still not have to meet any compensation tests.

In addition to changes in the compensation requirements, the proposal also includes new definitions on the type of jobs and industries in which employees qualify for overtime. First of all, the proposal retains the current "short test" reliance on an employee's primary duty and eliminates the long inactive "long test" rule restricting an exempt employee from devoting more than 20% of time – 40% in retail or service establishments – to activities that are not directly and closely related to exempt work. Next, to determine whether an executive employee is exempt, under the proposed executive duties test, three criteria must be met: whether the employee's primary duty is the management of the enterprise or a recognized department or subdivision, whether that employee customarily and regularly directs the work of two or more other employees, and whether that employee has the au-

thority to hire or fire other employees or his/her recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight. It is unclear whether this new definition would significantly affect the reach of this exemption.

To determine whether an administrative employee is exempt from overtime the proposal eliminates the longtime test of whether the employee customarily and regularly exercises discretion and independent judgment and replaces it with a new test that an employee must hold a "position of responsibility." This is satisfied by an employee who performs administrative work of substantial importance or performs work requiring a high level of skill or training. The proposed definition continues to exclude "production and sales employees" from the administrative exemption. It is also unclear whether this new definition would significantly affect the reach of this exemption.

For professional employees, the proposed test is whether the employee's primary duty requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instructions. This definition includes employees who gain equivalent knowledge and skills through a combination of job experience, military training, attend-

ing a technical school or attending community college.

The proposal also broadens the creative professional test to include work of "originality" and encompasses recognized fields of "creative" as well as artistic endeavor. The proposed test for computer employees will not change the current regulation and the proposed test for an outside sales employee would only substitute the "primary duty" definition for the current requirement that not more than 20% of the employee's time be spent in nonexempt activities.

The proposal, however, would permit employees with guaranteed annual compensation of \$65,000 (including bonuses and commissions) to qualify for an exemption if they meet even one of the exempt duties or responsibilities (i.e. they have at least one of the identifiable executive, administrative, or professional functions).

These regulatory proposals are subject to a 90-day public comment period, require no congressional action, and could become official late this year or early in 2004.

*Raquel Elejabarrieta is an associate with Morgan, Lewis & Bockius, L.L.P., in Miami, Florida, specializing in labor and employment law. Ms. Elejabarrieta received her J.D., magna cum laude from the University of Miami in 2002.*

## RESTRICTIVE COVENANTS

from page 1

### I. Background

The general rule in Florida has always been that non-compete agreements are considered personal services contracts. Therefore, they are not assignable without the employee's consent or ratification. *Schweiger v. Hoch*, 223 So.2d 557, 558 (Fla. 4th DCA 1969) (citing *Orlando Orange Groves Co. v. Hale*, 161 So. 284 (Fla. 1935)).

Further, at the time of enactment of the 1996 statute, Florida cases had rejected the argument that an employee's continued employment may be construed as sufficient consent or ratification of an assignment

to permit enforcement by an assignee or successor. Express consent or ratification was necessary. See *Johnston v. Dockside Fueling of North America, Inc.*, 658 So.2d 618 (Fla. 3d DCA 1995) (mere continued employment with a new, successor corporation was not, in and of itself, sufficient to constitute consent to allow assignment of restrictive covenant and enforcement by successor); *Schweiger*, 223 So.2d at 559 (continued employment with new partnership could not in itself be construed as sufficient knowledge and consent to conclude that the parties intended the contract to be assigned or that the assignment

was consented to or ratified by the defendant).

Accordingly, the 1996 statute simply codified the pre-existing law in Florida that a noncompete agreement may not be enforced by a successor or assignee, unless the covenant so provides, or the employee expressly consents to enforcement or ratifies an assignment of contractual rights. No change in the controlling law regarding assignments was intended.<sup>1</sup>

In sum, where the corporate entity that wishes to enforce a restrictive covenant is an assignee or successor of the original employer, the covenant

See "Restrictive Covenants," page 10