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The Labor & Employment Law Section

INSIDE:

Seminar:

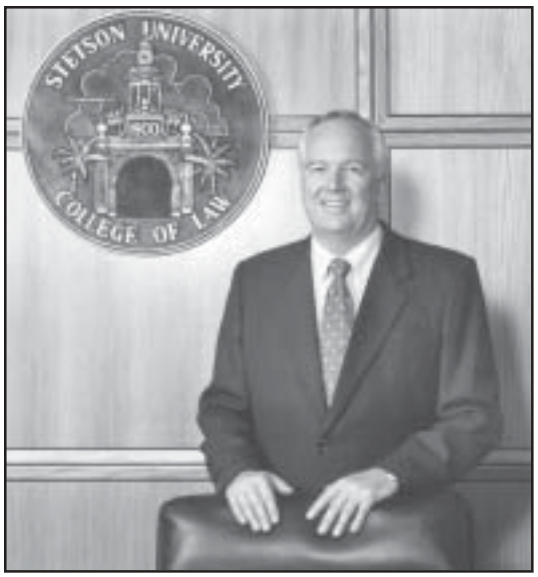
29th Annual Public Employee Labor Relations Forum

Oct. 23 - 24, 2003
Orlando

See pages 24-25.

W. Gary Vause: A Life of Service

Note: The interview with Dean Gary Vause was conducted by Frank Klim two weeks before the dean died.



Even as a youngster, W. Gary Vause knew something about lawyers. And he knew something else, too: He didn't want to work in the timber industry, like his father did.

W. Gary Vause, vice president and dean of Stetson University Law School, died May 9 at his Gulfport home, one day before Stetson's 103rd Spring Commencement. He recalled his youth and highlights of his lengthy career during an interview conducted a few weeks before his death.

"When I was a boy in Tallahassee, back in the late 1940s and early 1950s, it was really something to be a lawyer," Dean Vause recalled. "A lawyer was a statesman, a leader in the community. I really looked up to the lawyers I knew through my father and my family."

But it was Dean Vause's father who motivated his son to pursue a good education. The elder Vause was a hard worker and a good provider, but he had not had the luxury of an education, and he earned his living through hard labor in the logging and timber industry. Sometimes the elder Vause would take his young son along to the worksite, where he would carry water to weary workers and do other chores.

"My father would say, 'Son, do you like doing this kind of work?' I would always say, 'No, I don't,'" Dean Vause said. "His answer was always the same: 'if you don't get an education you'll be doing this for the rest of your life.' That was the biggest incentive I had to get out there. I knew I had to work and get a college education."

The dean's education began in the same six-room Tallahassee elementary school his mother had attended. The Vauses could trace their Tallahassee roots to the early 1800s, when family members moved to the newly established north Florida capital city from South Carolina. The Vause Tallahassee farm remains in the family to this day.

Wanting a college education was one thing; financing it was another. Gary Vause began his college tuition strategy while he was still attending Leon High School. With a loan co-signed by his father, he bought a new 1958 Volkswagen and used it to deliver newspapers before and after school. During the next four years, he would rise at 4 a.m. daily and deliver the Tallahassee morning newspaper, the Florida Times Union. After school, he would deliver the Tallahassee Democrat.

"At one point, I had about one thousand papers on my route," the dean recalled. "I would remove the passenger seat to get all those papers into the VW."

During his last two years of high school and then his first two years at Florida State, a young Gary Vause traveled more 200,000 miles of county roads and used up four Volkswagens. But he had accomplished his goal – he earned enough money to become the first member of the Vause family to attend college.

After two years at Florida State, the Cu-

see "Life of Service," page 13

Chair's Report

As my term as Chair comes to a close, I can't help but consider our progress towards my goals for the Section; to increase outreach, access and involvement in the Section by making the Section more relevant to its members. As I reflect and prepare my last installment of the Chair's Message, I continue to wonder whether the Chair's Message is a paradigm of the challenges confronting the Section leadership. That is, though it takes effort to write it, and more effort and expense to publish it in the Checkoff, is it really reaching the Section membership, does it help to accomplish goals set by the Section leadership, and is it relevant to Section members?

Despite the fact that we can probably never measure the success of a publication or any other effort, I believe it is important that we continue to expend the effort and be willing to try new approaches to achieve these goals. That is why I'm still writing. The major "accomplishment" of my term appears to have been the restructuring of our committee system in an effort to stimulate more innovation, opportunity and active involvement in the Section through committee work. It may not succeed, but that should not mean that we stop trying and simply conclude that the Section will always be a valuable resource and opportunity for only a fraction of its members.

A less successful initiative was my effort to establish some more definitive and demanding requirements for Section leadership positions. Admittedly, making it ostensibly more difficult to attain and retain a leadership position is on its face exclusionary rather than inclusive. This was not my intent and it has not been my experience. Instead, the current system of virtually no requirements, or even defined aspirations, has yielded a fairly stagnant body. In contrast, I believe that stimulating more activity and requiring a certain amount of turnover, would afford more Section members at-large the opportunity to get involved, make contributions and rise through the ranks of Section leadership without having to await the occasional "retirement." Again, I am well aware this might not work. Section members may not be chomping at the bit for such opportunities, the same small minority of our membership may continue to carry the load, and "term limits" may drive some valued contributors away from leadership roles. I believe it is a risk we should take.

Finally, I offer my heartfelt thanks to all of you for your support. "All of you" being the folks who care about the Section enough to devote time to reading the Chair's Message (and other drivel I've put forth). And "support" meaning support for the Section, its members and its future, whether expressed as alignment with my ideas or steadfast opposition to them.

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 catch-all 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,
2002-03 Chair

The CHECKOFF

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Chair's Report

As the Section begins its new year, I look forward to implementing and shepherding the Committee changes our past Chair Courtney Wilson and the Executive Council approved. During this transition phase, the themes will be: accessibility, accountability and utility. Since many of these changes will be substantial, I want to thank everyone in advance for their help. Courtney did a great job last year synthesizing a variety of ideas for change and creating a workable structure. Successful implementation is an exciting challenge confronting us this year.

As Courtney's Chair's message details, we have a revised Committee structure: Legal Education, Special Projects, Long Range Planning, and Membership/Outreach. The Legal Education Committee has the following subcommittees: Continuing Legal Education, Judicial Education, Website Committee, Publications (the Bar Journal and the Checkoff) and Current Legal Developments. The thinking behind the subcommittee combination is to link all educational vehicles to increase the quality and usefulness of each component and better serve our membership.

A similar idea motivates the creation of the Membership/Outreach Committee. This Committee has several subcommittees: Law School Liaison, Local/Voluntary Bar Association Liaison, ABA Liaison and New Membership/Outreach. We have tasked the Committee members with improving the links between the Section leadership and membership and between the membership and external entities. Over the years, the Section has sponsored various projects and events with each of these groups. Now, we are formalizing the structure and support for these outreach links.

One of the most important outreach efforts concerns Section membership. We are always looking for individuals who are interested in actively contributing to Section activities, either through CLE presentations, Checkoff articles or helping organize membership dinners or mixers. If you sent in the form indicating your Committee preferences, you will be contacted soon by the appropriate Committee or Subcommittee Chair requesting your help. Many of you also indicated an interest in an opportunity to join the Executive Council. The New Membership/Outreach Subcommittee will contact those of you who did so. They will answer any questions you might have about Executive Council activities and further explore your interest in being elected to join the Council.

In closing, I cannot emphasize enough the importance of achieving inclusion of a greater number of members in Section activities. To that end, I welcome any comments or suggestions any member has about how to meet this goal. We are looking forward to a great year and would like each of you to come join with us in enacting our new vision!

— Cathy J. Beveridge
2003-04 Chair

LRS

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2003 Amendments to the Florida Civil Rights Act

by Shane T. Muñoz & Jay P. Lechner

Businesses may be sued or investigated by the Attorney General for employment discrimination even if their employees never file a complaint with the Florida Commission on Human Relations ("FCHR") or the Equal Employment Opportunity Commission ("EEOC"), pursuant to the recently enacted Dr. Marvin Davies Florida Civil Rights Act ("Act").[1] Deemed "Florida's most important civil rights legislation in a decade" by Attorney General Charlie Crist,[2] this legislation amends the Florida Civil Rights Act of 1992 to give the Attorney General the independent authority, in pattern or practice cases or where discrimination "raises an issue of great public interest," to bring a civil action for damages, injunctive relief and civil penalties. The Act further expands the Attorney General's authority to investigate potential violations of the Florida Civil Rights Act.

In addition, the Act prohibits discrimination in "places of public accommodation" based on race, color, national origin, sex, handicap, "familial status" or religion (but not age). Because the phrase "places of public accommodation" is loosely defined, the Act arguably gives the Attorney General extensive authority to sue or investigate a wide range of businesses for discrimination against patrons and employees.

A. Background

The Act is largely the result of Attorney General Crist's efforts to expand the Attorney General's enforcement authority in civil rights actions.[3] In the past, the Attorney General's authority has been limited in civil rights cases because the state could only file civil rights suits in matters involving interference with a person's constitutional or statutory rights by "threats, intimidation or coercion."[4] Because pattern and practice discrimination cases do not generally involve threats, intimidation or coercion, in the past most of the Attorney General's efforts to address civil rights violations have been based on the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") under the theory that the discrimination was unfair and deceptive.[5]

For example, the well-publicized Thai Toni Restaurant, Adam's Mark Hotel, and Perry Package Store and Lounge cases involved alleged acts of discrimination such as the placing of a selective surcharge on restaurant checks, selective financial requirements for hotel guests, and requiring certain beverage store customers to be served in a different portion of the establishment, respectively.[6] However, the Attorney General pursued these cases as economic wrongs under FDUTPA, not civil rights violations under the FCRA, because they did not involve the use of threats, intimidation or coercion.

B. Prior Statutory Scheme

Prior to the new amendment, the FCRA already made it unlawful to discriminate in employment on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.[7] The prohibition on employment discrimination extended to discriminatory employment decisions made because of an individual's protected status,[8] discriminatory practices which deprive or tend to deprive an individual of employment opportunities or adversely affect an individual's status as an employee because of such individual's protected status,[9] and employment decisions made in retaliation for an employee opposing an unlawful employment practice or engaging in protected activity.[10]

The FCRA also already provided that its remedial provisions applied not only to employment discrimination, but also to unlawful discrimination "because of race, color, religion, gender, national origin, age, handicap, or marital status in the areas of education, . . . housing, or public accommodations . . . ."[11] However, the FCRA did not itself prohibit discrimination in education, housing or public accommodations. Rather, discrimination in those areas was made unlawful by other provisions of the Florida Statutes. [12] Moreover, prior to the enactment of the Dr. Marvin Davies Florida Civil Rights Act, the Florida statute that prohibited discrimination in public accommodations applied only to public lodging

See "Civil Rights Act, " page 9

WANTED: ARTICLES

The Section needs articles for the *Checkoff* and the Bar *Journal*. If you are interested in submitting an article for the Checkoff, contact either Ray Poole (904/356-8900) (*rpoole@constancy.com*); or Scott Fisher (813/229-8313) (*sfisher@fowlerwhite.com*). If you are interested in submitting an article for the Bar *Journal,* contact Frank Brown (813/224-9004) (*brown@2mlaw.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 October 31 2003.

Recapping the 2002-2003 Supreme Court Term

by Alexandra K. Hedrick

The Supreme Court settled several questions of procedure, coverage, burdens of proof, evidence and damages in its 2002-2003 term. Following are the term's employment law highlights.

What is an Employer? An Employee?

***Clackamas Gastroenterology Assocs., P.C. v. Wells,* 123 S. Ct. 1673 (2003).**

Most anti-discrimination laws do not apply to very small businesses. When employers are close to the coverage threshold (15, 20, 50, etc.), defining the term "employee" is critical. *Clackamas* involved a professional corporation of physician owners and staff that would have been a covered employer counting the four physician owners but not a covered employer if they were not counted. In deciding *Clackamas*, the Supreme Court resolved a conflict among the circuits as to when individuals (and particularly owners) are counted as employees (vs. employers) for coverage purposes.

The Court remanded the case for a coverage determination under the EEOC's guidelines on the definition of "employee" in EEOC Compliance Manual at 605:0009 (2000). The guidelines are based on the common law of agency, and the "guidepost" is the degree of the master's "control over the servant."

The EEOC uses six factors to determine "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control."

The six factors are: whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; whether and, if so, to what extent the organization supervises the individual's work; whether the individual reports to someone higher in the organization; whether and, if so, to what extent the individual is able to influence the organization; whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; whether the individual shares in the profits, losses, and liabilities of the organization.

Local Governments Are Subject to False Claims Act Coverage

***Cook County v. United States ex rel. Chandler,* 123 S. Ct. 1239 (2003).**

Local governments are subject to

See "Recapping SC Term," page 17

The Supreme Court Confirms That Employers Can Remove Fair Labor Standards Act Cases to Federal Court

by Scott A Fisher

"Except as otherwise expressly provided by Act of Congress," a defendant may remove "any civil action brought in a State Court of which the district courts of the United States has original jurisdiction."[1] There was a split in the Circuit Court of Appeals over whether the Fair Labor Standards Act (FLSA) expressly prohibited removal. The conflict was over whether the FLSA's language that a FLSA action "may be maintained" in any Federal or State Court of competent jurisdiction prohibited removal once a plaintiff filed a FLSA claim in State Court.[2] The Eleventh Circuit Court of Appeals and the First Circuit Court of Appeals[3] both held that a defendant can remove a FLSA case from State to Federal Court because the FLSA did not expressly prohibit removal. Conversely, the Eighth Circuit Court of Appeals previously held that a FLSA claim was not removable to Federal Court.[4]

On May 19, 2003, the United States Supreme Court resolved the split and held that a defendant can remove a FLSA case to Federal Court.[5] In *Breuer v. Jim's Concrete of Brevard, Inc.*, the plaintiff sued his former employer in a Florida State Court for unpaid wages under the FLSA. The defendant removed the case to the United States District Court for the Middle District of Florida. The District Court denied plaintiff's motion to remand the case to State Court, but certified the issue for interlocutory appeal.[6] The Eleventh Circuit affirmed.[7] The Supreme Court reversed and held that the term "maintain" was too ambiguous to prohibit removal.

The *Breuer* plaintiff/appellant made several arguments against allowing removal. The plaintiff distinguished between "maintained" and "brought." Congress must have meant to prohibit removal since Congress provided that a FLSA case "may be maintained" in Federal or State Court rather than state that a FLSA may be brought in State or Federal Court.[8]

The *Breuer* plaintiff also relied on a Senate Committee report that stated "if filed in the State Courts the [FLSA] prohibits removal to the Federal Court."[9] However, the report was on 28 U.S.C. §1445 and focused on the removability of state workers' compensation cases, not FLSA claims. The Supreme Court rejected this argument and stated that "a stray comment in a Congressional report stands a long way from an express statutory provision."[10]

The Supreme Court focused on the removal statute's requirement of an express provision prohibiting re-

See "Court Confirms," page 16

Restrictive E-mail Policies and the National Labor Relations Act — 2003 Update

by Steven D. Brown

I. Introduction

As the use of e-mail and instant messaging[1] in the workplace has grown exponentially over the last 10 years, many employers implemented policies to severely limit the use of e-mail to work-related issues only. However, these policies have rarely been strictly enforced and employees have generally been free to communicate with one another about a number of non-business matters, including– but not limited to– sporting events, items for sale, relationship advice, birth announcements and charity fund-raising campaigns.

However, when an employee wants to use the employer's e-mail to communicate with other employees about union matters (campaigning, collective bargaining issues, etc.), numerous employers cite the restrictive e-mail policy as the justification for preventing the communication and for disciplining the employee for sending the union-related e-mail. Essentially, employers argue that they own the e-mail system and they should be able to control the content by pulling the plug on those employees that want to use their computer property to send out union messages.

The unions contend that many of these e-mail policies are overly broad no solicitation rules that violate Section 8(a)(1)[2] of the National Labor Relations Act ("NLRA" or "the Act"). Additionally, the unions are claiming that even if these policies are not overly broad, employers are enforcing them in a discriminatory manner in violation of Section 8(a)(1).

Currently pending[3] before the National Labor Relations Board ("NLRB") are *The Guard Publishing Company, d/b/a The Register Guard*[4] *and The Prudential Insurance Company of America*.[5] Both of these cases[6] deal with overly broad restrictive e-mail policies that prevent any solicitation and the discriminatory enforcement of restrictive e-mail policies.

II. The Board Needs To Issue Practical Guidelines for E-mail: Is It a Solicitation or Distribution or a Hybrid?

A. Background

1. Company bulletin boards and telephones

The Board has consistently held there is no statutory right of an employee or the union to use an employer's bulletin board.[7] Therefore, the employer can govern what is posted on the company bulletin boards. However, if the employer allows employees to post personal items on the bulletin board, it cannot then prevent the posting of union material.[8] Moreover, an employer may restrict the use of its telephones for business only. As employers know, these telephone policies look good on paper but they are rarely enforced. Employees usually make occasional personal calls during work time and if that happens, then the employer may not exclude union topics of discussion on the company telephones.[9]

2. Union solicitation and distribution on company property

Employers are free to stop any verbal solicitation during working time only. As for the distribution of written material, the employer may limit it in work areas at all times.[10]

3. E-Mail doesn't fit any of the usual boxes

E-mail and instant messaging do not seem to fall into any of the recognized categories that the Board has reviewed. Many employers do not restrict employees from sending or receiving personal e-mails during the workday. Like personal phone calls, employers have allowed employees to send personal e-mail messages during working time and from work areas. Additionally, e-mails could also be viewed as both solicitations and distributions. On a break, an employee could easily converse with another employee through e-mail or instant messaging on a real time basis.

B. The current e-mail cases pending before the Board are split on whether restrictive communication policies are per se overbroad

1. *Guard Publishing*

In 1996, Guard Publishing (the owner of a newspaper in Eugene, Oregon) installed a computer system with e-mail and most of its employees used it on a daily basis. In conjunction with installing the computer, Guard Publishing issued a written communications policy that applied to all methods of communication, including the telephone, computers, fax machines, etc.[11] Specifically, the policy prevented employees from all non-job-related solicitations and it warned the employees of discipline, up to and including termination, for violation of the policy.[12]

During the entire time the e-mail system was operational, employees sent numerous e-mails that were not job related. For example, employees sent e-mails regarding going away parties, walking dogs, basketball tickets, and birth announcements.[13] The employer did not discipline any of the managers or employees that used the e-mail system for non-business purposes. On May 4, 2000, the copy editor (also the union president), sent an e-mail to 50 coworkers in her capacity as the union president. She used the e-mail system at work to send this e-mail. On May 5th, the copy editor was written up for violating the employer's communication policy by sending a union related e-mail.[14] On August 14, 2000, the copy editor sent an e-mail from the union offices to all of the employees at their work e-mail addresses advising them to wear green to support the union's negotiations over raises in the new contract. On August 18, 2000, the

See "E-mail Policies," page 19

Federal Unions' "Perfect Storm"

by Peter R. Marksteiner[1]

As this article is being written, lawmakers are hashing over legislation with the potential to bring about the most significant overhaul of the federal civil service since the Civil Service Reform Act of 1978.[2] Whereas the current reform proposal, generally referred to as the National Security Personnel System, or NSPS, is a promising development from the perspective of federal agency managers, it's an unsettling omen to their union counterparts. The subject of civil service reform has worked its way into public discussions at fairly regular intervals over the last several years, but notwithstanding all those discussions there has been very little real change.[3] Now however, with a legislative proposal actually making its way through committees (perhaps even passed in one form or another by the time this goes to print), federal unions face the prospect of losing considerable influence in a workplace un-tethered from much of the bureaucratic machinery that has governed labor management relations in the federal sector for over two decades.[4] While it's entirely possible that the current initiative will either whither away in the process or become so watered down that it ceases to be noteworthy, like so many failed attempts in the past, several factors make real reform much more likely this time around. As a result, unions are finding themselves perilously in the path of what could be thought of as federal labor's perfect storm.

What makes the current reform movement so different? The answer is a combination of several forces operating in concert that are producing unprecedented momentum. The first is the current administration's focus on contracting out civil service jobs to the private sector and the recent revisions to the rulebook (OMB Circular A-76) that make it easier for agencies to do so.[5] The second is the mounting pressure on agencies under the Government Performance and Results Act[6] to improve the efficiency of their operations. The third is what has been referred to as the "crisis in human capital," a phrase used to describe what may potentially be a drastic thinning of the civil service ranks as a looming retirement wave threatens to gut the federal workforce by as much as half in the coming years.[7] Even more influential than all these forces, however, are the timing of the current initiative and the political gravitas wielded by its leading proponents.

As to timing, some commentators have suggested the proposal's introduction as part of a Defense appropriations bill in the wake of the U.S. Military's successful prosecution of Operation Iraqi Freedom was no accident.[8] Coming off of what has been heralded as an unprecedented military victory, the defense establishment—sponsor of the reform bill—is riding a wave of public support that places those who oppose reform in the uncomfortable position of appearing soft on terrorism or defense of the homeland.[9]

Next to timing, the other critical component in any serious reform initiative is having a good spokesperson. Secretary of Defense, Donald Rumsfeld, is one of reform's most visible advocates. "The problem we face in the DoD," according to Secretary Rumsfeld, "is quite simple: We're dealing with terrorists that can move information with the speed of an e-mail, they can move money with the speed of a wire transfer, they can move people with the speed of a jet airliner, and the DoD, unfortunately, is still bogged down in industrial age procedures and requirements and rules and bureaucracy. . . ."[10] Describing the significance of Secretary Rumsfeld's role in the current reform initiative, Paul Volker, Chairman of the National Commission on Public Service said "[t]his is quite an occasion. It is you, sir, [referring to Secretary Rumsfeld] who are bringing us, I think, more . . . to the attention of the American public than we've been able to do from our particular vantage point."[11]

Competing Views in the Reform Debate

Proponents of the reform proposal say it's required in order to make the DoD more efficient, and ultimately to enable it to be as organizationally agile as the enterprises that would do harm to U.S. interests.[12] Meanwhile, opponents of reform are busily expressing their outrage, as one might expect, at what's been disparaged as a nefarious plan designed to "eliminate the laws that provide fair pay and protections for those civilian employees."[13] With mountains of testimony, speeches, studies and reports seemingly supporting both views, it's hard for the casual observer to pick a side based on anything other than gut feel or partisan allegiance.

What Do the Reports & Studies Say?

The weight of objectively based commentary soundly supports the proposition that civil service reform, particularly in the employee grievance and appeals arena, is long overdue. For more than two decades, the General Accounting Office (GAO), the U.S. Office of Personnel Management (OPM), the U.S. Merit Systems Protection Board (MSPB), scholars, federal managers and employees have described the federal employee redress system as unwieldy, inefficient, and overly protective of individual employee rights.[14] Likewise, notwithstanding the predictable lamentations from federal union leaders about the plight of the beleaguered federal employee[15], the most comprehensive survey of federal employees to date, conducted by the U.S. Office of Personnel Management, suggests that most of them are about as happy with their jobs as their private sector counterparts, believe they're well compensated for what they do, and would favor fewer protections for poorly performing or otherwise problem employees.[16]

The employee grievance and appeal process invariably becomes the rhetorical hot potato when reform initiatives start heating up.[17] The last time the reform debate was in the papers was the fall of 2002 during the debates about whether the new Department of Homeland Security (DHS) should be accorded "manage-

See "Perfect Storm," page 21

Ten Ingredients for a Successful Mediation Process

by Bruce A. Blitman, Attorney At Law/Certified Mediator

It's hard for me to believe I've been mediating since 1989. During the past thirteen years, I've been privileged to mediate thousands of disputes. When I started out as a mediator, my definition of a successful mediation was pretty simple: if the case settled (and I was fully paid for my mediation services), it was a successful mediation. However, through the years, my definition of a successful mediation has evolved. I've discovered that a case can be successfully mediated even if it is not completely-or even partially-resolved at the conclusion of the mediation session. Today, I consider a mediation to be successful whenever the parties and their attorneys are able to exchange information, ideas and perspectives. When they are able to leave a mediation session with a better understanding of their own interests, needs, motivations and concerns as well as a keener understanding of the other parties' interests, needs, motivations and concerns, I believe the participants have engaged in a successful mediation process. While settling a case is always nice, it is not essential for a "successful mediation." Parties, their lawyers and mediators should not feel as if they have failed because the mediation did not end with the signing of a settlement agreement.

Since 1989, I've had the unique opportunity to work with exceptional negotiators from diverse backgrounds and professional experiences. Many of these disputes were settled at mediation. Unfortunately, some were not. After each mediation, I review the case to explore how and why the case ended the way it did. Through the years, I have found common elements present in cases that were "successfully mediated" and absent in those cases which ended badly. In this article, I will discuss the key ingredients always present in a successful mediation process. If you liberally apply these ingredients when you mediate, you will have the recipe for a successful mediation-one in which you and your clients will get the most out of your mediation experience.

1. PREPARE YOUR CLIENT. Clients are more comfortable during the mediation process when they understand how the mediation process works. Take the time to educate your client about the basic workings of the mediation process. Take the time to discuss the mediation process with your client BEFORE the mediation. Furnish your client with written materials which explain mediation. Have someone in your office show the client a videotape of what a mediation conference looks like. There are some outstanding videos about mediation available. In Florida, for example, The Florida Dispute Resolution Center (DRC) has produced an excellent thirty-minute videotape about family mediation entitled "Mediation Works." It can be purchased for approximately $10.00 from the DRC, which is located at: Supreme Court Building, Tallahassee, FL 32399-1905 Telephone: (850) 921-2910. Time invested in preparing your clients for mediation, will yield significant dividends during the mediation process.

2. PREPARE YOURSELF. Well prepared attorneys are an essential ingredient to a successful mediation process. Well prepared counsel know everything they need to know about their file. They are ready and eager to intelligently discuss both the strengths and weaknesses of their client's case, as well as the strengths and weaknesses of their opponent's case. Frequently, well prepared advocates will prepare a mediation summary for the mediator (and the client) to review before mediation. They are aware of the governing rules of state and federal civil procedure, and furnish their opposing counsel with copies of their summaries as required by law. They know what they will need to prove in order to prevail at trial. They have reviewed all pertinent jury instructions with which a jury is likely to be charged. They have all of the necessary medical records, financial records, tax returns, and/or other documentation needed to prove their case available at the mediation conference. They have met with their clients BEFORE MEDIATION and discussed the potential strengths and weaknesses of the case. They are familiar with personal details of the clients' lives, such as their age, marital status and occupation, and are well aware of their clients' emotional and financial needs. All of this information helps them thoroughly and comprehensively present their client's perspective during the mediation conference. Well prepared attorneys understand that, during the mediation conference, they are also being scrutinized- by their own clients, as well as by the opposing parties and their counsel. They also understand that excellent preparation, coupled with excellent presentations at mediation, can significantly affect the outcome of the case.

3. KNOW WHAT YOUR CLIENTS REALLY WANT AND NEED. Cases cannot be resolved unless a sufficient number of the parties interests and needs can be satisfied. Do the parties want money damages, just compensation, vindication, retribution, an apology, or a "pound of flesh"? For lawyers representing plaintiffs on a contingency fee basis, it is far better for them to discover their clients really only want an apology as early in the case as possible, and not during the trial. In successful mediations, the parties and their counsel understand their own, and the other participants', interests, needs, motivations and concerns. This under- standing can frequently save attorneys and their clients a lot of time, money, and unnecessary aggravation.

4. HAVE A GAME PLAN. In successful mediations, the parties and their counsel are effective negotiators. They know what they want out of the case and develop a strategy to accomplish their objectives. They understand that the mediation process is a negotiation process. They know where they want to begin and where they would like to finish. They have a clear understanding of their destination, and a flexible strategy for arriving at their destination. Also, effective negotiators don't expect opposing parties, their counsel or the

See "Ten Ingredients, " page 12

and food service establishments.[13] Further, the FCRA did not contain a definition of the term "public accommodations."

Prior to the amendment, claims of employment discrimination under the FCRA have been handled primarily by the FCHR, and lawsuits were generally initiated by the complainant after the complainant had exhausted his or her administrative remedies.[14] Although the FCHR has been authorized to, on its own, initiate a complaint,[15] prior to the amendment the employee would generally have to initiate steps to address the discrimination by filing a complaint within 365 days of the alleged violation. Moreover, in practice, the FCHR had handled complaints only administratively and, unlike the EEOC, has not brought suit against employers for suspected discrimination.

The role of the Attorney General in this process has been limited. Unlike in housing discrimination cases, where the Attorney General is required to bring an action on behalf of the aggrieved person if the FCHR finds there is reasonable cause to believe that a discriminatory housing practice has occurred,[16] prior to the new amendment an aggrieved party who wished to bring an employment discrimination case under the FCRA was required to file his or her own civil action.[17] As discussed, *supra*, the Attorney General's authority to file suit has been limited to cases involving threats, intimidation, or coercion. This authority has been further restricted by the Attorney General's limited authority to investigate employment discrimination claims, as there has been no formal mechanism or statutory authority for the Attorney General to independently investigate potential discrimination.

C. The New Amendments

The Act amends the FCRA in part by expanding the Attorney General's independent authority to initiate a civil actions alleging unlawful discrimination. Section 760.021(1) permits the Attorney General to commence a civil action for damages, injunctive relief, and other appropriate relief if he or she has reasonable cause to believe that any person or group:

> (a) Has engaged in a pattern or practice of discrimination as defined by the laws of this state; or
>
> (b) Has been discriminated against as defined by the laws of this state and such discrimination raises an issue of great public interest.

This civil action may be filed either "in the circuit court of the county where the cause of action arises" or "in the circuit court of the Second Judicial Circuit, in and for Leon County."[18] Any damages recovered must "accrue to the injured party."[19] In addition to seeking damages, injunctive relief and other appropriate relief, the Attorney General may also recover civil penalties up to $10,000 per violation as well as attorney's fees and costs.[20] This authority is similar to that currently provided in Section 760.51, which requires that the civil penalty be deposited into the General Revenue Fund.

The Act also expands the authority of the Attorney General's Office of Civil Rights to investigate potential violations of the FCRA.[21] The Attorney General may now administer oaths, subpoena witnesses and documents, and collect evidence for investigations of violations of constitutional and statutory rights. This expansion of investigative powers was deemed necessary based on the premise that the Attorney General would need this expanded investigative authority to be able to form a basis for "reasonable cause to believe" that there is a pattern or practice of discrimination or discriminatory practice that is of general public importance.[22] Previously, the FCHR had statutory authority to investigate matters within its jurisdiction, while the Attorney General had presuit investigative powers only for violation of rights arising under Section 760.51 and discrimination in private clubs arising Section 760.60.

The Act also prohibits discrimination in places of public accommodation. The Act provides:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this chapter, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion. [23]

The Act defines "public accommodations" to include, not only hotels, restaurants, gas stations, and places of exhibition or entertainment, but also "places of public accommodation . . . and other covered establishments."[24]

The Act also provides certain protections for defendants against overzealous prosecution by the Attorney General. For example, Section 760.021(3) provides that the respondent may request, before any responsive pleading is due, that a hearing be held no earlier than 5 days but no more than 30 days after the filing of the complaint, at which hearing the court shall determine "whether the complaint on its face makes a prima facie showing that a pattern or practice of discrimination exists or that, as a result of discrimination, an issue of great public interest exists." Additionally, the Act provides that the "prevailing party" is entitled to an award of reasonable attorney's fees and costs.[25] The legislative history of the Act shows that a number of representatives' votes were predicated on their understanding that small businesses and those wrongfully accused would be protected by allowing a "prevailing party" to recover fees.[26]

D. Impact of Amendments

Although the Act appears to focus primarily on discriminatory practices in public accommodations, by its language the Act applies broadly to discrimination in education, employment, housing and public accommodations. Nothing in the text of the Act prevents the Attorney General from using the new enforcement authority in the employment context. Therefore, it is entirely possible that employers will see the Attorney General using the Act to bring employment discrimination lawsuits, or to investigate claims of employment discrimination. As discussed below, the Act also arguably expands the definition of prohibited employment discrimination. Further, it appears likely that there will be significant questions about the meaning and in-

terpretation of key terms in the Act.

The Attorney General's exercise of the new enforcement authority in the employment context could create substantial burdens for employers. There is nothing in the text of the Act that suggests that suit by the Attorney General has any impact on a complainant's right to maintain his or her own separate action. Under the FCRA, if an employee files a timely charge with the FCHR and satisfies the requirements of sections 760.11(4), (7) or (8), the employee may elect to either pursue administrative remedies or file a lawsuit. Section 760.11(4) provides that this election by the aggrieved person "is the exclusive procedure available to the aggrieved person pursuant to this act." But nothing in the Act expressly addresses whether the Attorney General and the aggrieved person may pursue separate actions arising out of the same alleged acts of discrimination.

Compounding this problem, the Attorney General "may file an action . . . in the circuit court of the county where the cause of action arises or in the circuit court of the Second Judicial Circuit, in and for Leon County."[27] Presumably, under this provision, an employer in Miami or Key West could be sued by the Attorney General in Tallahassee, while at the same time being sued by their employee in the county where the cause of action arose. Nor does the Act expressly address whether recovery in one such action would preclude or act as an offset against recovery in the other such action. Thus, the Act creates troubling questions of whether employers could be forced to defend parallel actions, in different forums, perhaps with differing, inconsistent results and overlapping remedies.

The Act may also impact employers as places of public accommodation. As mentioned above, the Act extends Florida's prohibition on discrimination beyond public lodging and food service establishments. Most employers will fall within the new definition of public accommodations. The Act therefore substantially expands the number of employers who will now be covered by Florida's prohibition on discrimination in places of public accommodation. Of course, federal laws already prohibit discrimination in public accommodation.[28] Nonetheless, there appear to be differences, perhaps substantial, between the Act and existing federal laws. Therefore, Florida employers who fall within the Act's broad, and ambiguous (as explained more fully below), definition of "public accommodations" will now be subject to greater restrictions in this area.

Moreover, the statutory language and concepts of the Act, derived in large part from those found in the federal Fair Housing Act, do not always translate well into the employment discrimination context. For example, like Florida's Attorney General under the Act, the U.S. Attorney General under the federal Fair Housing Act ("FHA") has the independent authority to investigate and take action against discrimination in housing where he or she has reasonable cause to believe that any "person or group of persons" is engaged in a "pattern or practice" of housing discrimination or that a denial of rights under the federal FHA "raises an issue of general public importance."[29] However, unlike Florida's Attorney General under the Act, the U.S. Attorney General under Title VII of the Federal Civil Rights Acts of 1964, as amended, does not have the authority to investigate or initiate suit against private employers for suspected employment discrimination.[30] Rather the authority to investigate and file suit for private employment discrimination belongs to the EEOC. The U.S. Attorney General's authority to pursue employment discrimination issues is limited to the public employment context.

As a result, complex issues that are not evoked under the federal statutes, such as overlapping jurisdiction and coordination of efforts between agencies, will likely need to be addressed under the Florida Act. For example, both the FCHR and the Attorney General have potentially concurrent authority to investigate the same suspected violations of the FCRA. The Act does not address this interplay between agencies' authority and the impact it may have on what documents and other evidence will be shared and the effect such sharing will have on confidentiality.

The Act's application of federal housing discrimination terms and concepts to employment discrimination is also likely to cause confusion. For example, key phrases in Section 760.021(1), such as "pattern or practice" and "issue of great public interest," remain undefined. The meanings of these particular terms are extremely important because, where a defendant requests a preliminary hearing, a complaint may be dismissed where the complaint on its face fails to make a "prima facie showing that a pattern or practice of discrimination exists or that, as a result of discrimination, an issue of great public interest exists."[31]

The term "issue of great public interest" appears to be derived from the federal FHA phrase "issue of general public importance." The term "issue of general public importance" is not defined in either the 1968 Fair Housing Act or in its legislative history. However, courts, looking to the legislative history of the 1964 Civil Rights Act (which used a nearly identical term in empowering the Attorney General to intervene in private suits), have defined an issue of general public importance as one where " 'the points of law involved in it are of major significance or . . . the particular decision will constitute a precedent for a large number of establishments.' "[32] Similarly, in *Walker v. United States Fidelity & Guaranty Co.*,[33] the First District Court of Appeal, in the certiorari context, decided that an issue that "affects the rights of the entire citizenry of our state" was an "issue of great public interest."[34]

The broad and ambiguous definition of "public accommodations" and the ambiguity concerning exactly what acts are prohibited discrimination in public accommodations may be cause for considerable concern. For instance, the Act's definition of "public accommodations" includes "places of public accommodation . . . and other covered establishments."[35] This definition is circular and ambiguous.

Likewise, the Act states that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations" of any

place of public accommodation. While the terms "goods," "services" and "facilities," may be relatively easy to define, the meaning of the statutory terms "privileges" and "advantages" are not clear and are not defined by the Act. Conceivably, the "privileges" and "advantages" of a place of public accommodation could be extended to incorporate the concept of "employment." If so, the Act's prohibition on discrimination "on the ground of . . . familial status" may be interpreted as expanding the FCRA's prohibition of employment discrimination to a new protected class.[36] The term "familial status," although long included as a protected category under other forms of discrimination (e.g. sale or rental of housing, land use decisions and in permitting provision of brokerage services), has never been included as a protected category for purposes of employment discrimination. Rather, the FCRA's employment discrimination provisions refer to "marital status."[37] Pursuant to Florida's Fair Housing Act, "familial status" is established when an individual who has not attained the age of 18 years is domiciled with: "(a) A parent or other person having legal custody of such individual; or (b) A designee of a parent or other person having legal custody, with the written permission of such parent or other person."[38] This definition is consistent with the federal FHA's definition of "familial status."[39]

In contrast, "marital status," although not defined in the FCRA or in any other Florida anti-discrimination statute, has been defined by the Florida Supreme Court as meaning "the state of being married, single, divorced, widowed or separated, and does not include the specific identity or actions of an individual's spouse."[40] Accordingly, the Court held that Florida does not recognize a cause of action for "marital status" discrimination "where the basis of the claim rests on the allegedly unlawful discharge of an employee for actions by the employee's spouse." Therefore, "marital status" and "familial status" are different concepts. Consequently, if the Act's prohibition on discrimination in public accommodations is read broadly enough to incorporate forms of employment discrimination, the Act essentially creates a new protected category for purposes of employment discrimination. This result is inconsistent with statements made in the Act's legislative history that "[t]he intent of this legislation is not to expand the list of protected classes."[41]

E. Conclusion

The Dr. Marvin Davies Florida Civil Rights Act is a well-intentioned attempt to curtail discrimination and will likely help the Attorney General address the most heinous examples of discriminatory practices that arise in the state. However, the Act will almost certainly create new burdens on Florida employers. Moreover, because of ambiguities and because key concepts and terms are borrowed from statutes pertaining to other forms of discrimination, many unintended consequences can be expected in the employment discrimination context.

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Endnotes:

[1] Governor Jeb Bush signed the Act on June 18, 2003.

[2] June 18, 2003 News Release, Attorney General Charlie Crist; May 21, 2003 News Release, Attorney General Charlie Crist.

[3] January 21, 2003 News Release, Attorney General Charlie Crist.

[4] Section 760.51, Florida Statutes.

[5] Senate Staff Analysis and Economic Impact Statement, Bill CS/SB 0046-A (May 15, 2003).

[6] *See* Charlie Crist, Guest Column: History, teamwork help fuel act, Independent Florida Alligator (May 27, 2003); January 21, 2003 News Release, Attorney General Charlie Crist, "Attorney General Crist To Propose New Civil Rights Initiative."

[7] Section 760.10, Florida Statutes.

[8] Section 760.10(1)(a), Florida Statutes.

[9] Section 760.10(1)(b), Florida Statutes.

[10] Section 760.10(7), Florida Statutes.

[11] Section 760.07, Florida Statutes.

[12] Florida Educational Equity Act, Section 1000.05 *et seq*., Florida Statutes; Florida Fair Housing Act, Section 760.20 *et seq*., Florida Statutes; Section 509.092, Florida Statutes.

[13] Florida Statute §509.092 prohibits discrimination based on race, creed, color, sex, physical disability, or national origin in certain public accommodations; however, coverage is limited to public lodging and public food service establishments. Section 509.092, Florida Statutes.

[14] Section760.07, Florida Statutes.

[15] Section 760.11(1), Florida Statutes.

[16] Section 760.34(4), Florida Statutes.

[17] Alternatively, the aggrieved person may request an administrative hearing in lieu of a civil action. Section 760.11(4), Florida Statutes.

[18] Section 760.021(2), Florida Statutes.

[19] Section 760.021(5), Florida Statutes.

[20] Sections 760.021(1) and (4), Florida Statutes.

[21] Section 16.57, Florida Statutes.

[22] Senate Staff Analysis and Economic Impact Statement, Bill CS/SB 0046-A (May 15, 2003).

[23] Section 760.08, Florida Statutes.

[24] Section 760.02(11), Florida Statutes.

[25] Section 760.02(11), Florida Statutes.

[26] *See* House Floor Vote, Explanations of Vote (May 16, 2003).

[27] Section 760.021(2), Florida Statutes.

[28] See, e.g., 42 U.S.C. §12101 *et seq*.; 42 U.S.C. §2000a *et seq*.

[29] 42 U.S.C §3614.

[30] *See* 42 U.S.C. §2000e-6.

[31] Section 760.021(3), Florida Statutes.

[32] United States v. Pac. Northwest Elec., Inc., 2002 U.S. Dist. LEXIS 26305 at *61-62 (quoting United States v. Hunter, 459 F.2d 205, 217-18 (4th Cir. 1972)).

[33] 101 So. 2d 437 (Fla. 1st DCA), *cert. denied*, 102 So. 2d 728 (Fla. 1958).

[34] *Id*. at 438.

[35] Section 760.02(11), Florida Statutes.

[36] Section 760.08, Florida Statutes.

[37] Section 760.10, Florida Statutes.

[38] Section 760.22 (5), Florida Statutes.

[39] 42 U.S.C. §3602(k).

[40] Donato v. AT&T, 767 So. 2d 1146, 1155 (Fla. 2000).

[41] House Floor Vote, Explanation of Vote by Bill Sponsor Representative Kottkamp (May 16, 2003).

mediator to help them find their way.

5. DRESS FOR SUCCESS. In successful mediations, all of the participants understand the mediation conference is really a prelude to the trial. During mediation, the decisionmakers (the parties and counsel) have a unique opportunity to look at each other face to face and get some sense of how the parties will present themselves before a trier of fact. They understand how important it is for everyone to dress appropriately for this significant event. They recognize this is not the time for their "casual Friday" attire. Well prepared counsel instruct their clients to dress appropriately and SHOW them what that means. It is amazing how standards of personal taste vary-one person's definition of "appropriate" can differ dramatically from that of another. In my mediation experience, I've found the appearance of an articulate, well-groomed party at a mediation conference has significantly influenced the other party's evaluation of the case on several occasions. Unfortunately, so has the appearance of an inarticulate, inappropriately dressed party. Effective advocates know their clients and present them in the most favorable light possible at mediation.

6. USE DEMONSTRATIVE EXHIBITS. The use of graphs, photographs, models and other demonstrative exhibits can sometimes be extremely compelling during a mediation conference. The presentation of these exhibits can demonstrate counsels' professionalism and their strong commitment to their clients' cases. Sometimes the right picture truly can be worth a thousand words-and a significant amount of money.

7. SCHEDULE THE MEDIATION FOR THE APPROPRIATE AMOUNT OF TIME, AND AT THE APPROPRIATE TIME OF DAY. We are all busy people. In successful mediations, the parties and their counsel respect each other's valuable time. When they choose to mediate, they prioritize the case and give it their undivided time and attention. They do not want any of the participants in the mediation process to feel rushed or unduly pressured. An attorney who schedules a mediation conference for 1:00 P.M. knowing he has to attend an important deposition at 2:00 P.M., has done a great disservice to his client and the mediation process. During successful mediations, conferences are scheduled so that none of the participants is inconvenienced, stressed, pressured or distracted by the timing of the mediation. Invariably, effective mediation negotiators try to schedule their mediation conferences for times when they and their clients are at their emotional and physical best. If they know they (or their client) is not a "morning person," they won't schedule their mediations for early morning. Similarly, when they know they have to attend a hearing on a judge's morning motion calendar, they will schedule the starting time for a mediation conference accordingly. They understand it can be considered impolite to keep their clients, the other parties, opposing counsel and the mediator waiting for them to return from a delayed hearing. As a mediator, I have witnessed several cases unravel before they ever began, simply because one party kept the other waiting for a prolonged period of time.

8. BE PATIENT. In successful mediations, the parties and their counsel demonstrate extraordinary patience and self control. They understand that in many cases, it is virtually impossible for the parties and their attorneys to settle a case in under one hour. In cases that are emotionally charged or technically complex, it may take the parties and the mediator several hours to unravel and identify numerous issues and areas of conflict that have taken years to litigate. By working through these issues calmly and carefully, parties are frequently able to resolve their differences. Mediators should not rush the parties or force them to reach agreements. If the case is to be resolved, it should be resolved at the pace that is most comfortable for the parties-not necessarily their attorneys or the mediator. Patience truly is a virtue in mediation. In successful mediations, cases resolve only when the participants are ready to settle.

9. EDUCATE, DON'T INTIMIDATE. In successful mediations, parties and their counsel may disagree, but they do so agreeably. They use the mediation process to explain their positions to the other parties. They do not engage in yelling, screaming, and name-calling. They understand that such behavior may help them and their clients feel better, but it will not help them negotiate more lucrative settlement agreements. Instead, they use the mediation process to calmly justify, document and persuade the opposing parties about the reasonableness of their clients' positions in the case.

10. DON'T SLAM DOORS OR BURN BRIDGES. In successful mediations, the parties and their attorneys understand that they cannot always resolve the dispute during the initial mediation conference. They also understand there is no rule which prohibits them from settling their dispute tomorrow, next week, or some months after the initial mediation. They use the initial mediation conference as an opportunity to begin a dialogue with each other. They develop a positive line of communication during the mediation process, and build upon this initial rapport. They are frequently able to establish a framework for future negotiations which may ultimately result in settlement. Enlightened negotiators view mediation as an ongoing process, not a "one-time" event. At the conclusion of a mediation session, they do not issue threats or ultimatums, or storm out of the conference room indignantly. Instead, they politely shake hands and encourage future conversations.

The liberal use of these ingredients is your recipe for a successful mediation process. Best wishes for good health, good luck, and good mediation.

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ban Missile Crisis made international news, and Gary Vause felt a strong sense of duty.

"In my family we have a long tradition of military service," he said. "Being 20 years old, I felt it was my turn, so I enlisted in the Air Force." After a series of tests in various areas, the Air Force recommended a more extensive series of language tests. Gary Vause scored on top, and found himself in a one-year language program at Yale University.

"The Air Force gave me the option of studying Russian, Korean, Chinese and others," he recalled. "I chose Chinese. I would wear my uniform to class. I studied Chinese all day and studied more in a lab at night."

After completing the Yale program, the young airman was sent overseas as a part of a small intelligence unit that monitored Chinese Air Force communications. After his overseas tour of duty, Sergeant Vause was assigned to a base near Springfield, Mass. In January 1963, after an honorable discharge, he went directly to the University of Connecticut, first to complete his Bachelor of Arts degree and then to earn his J.D. degree. While at the University of Connecticut Law School, he edited the Connecticut Law Review, "enjoyed some good clerking experience," and developed an interest in collective bargaining law.

Upon graduation, the dean had offers from several law firms, but he decided instead to open his own practice in Hartford, Conn. "I was out of school for about six months when the University of Connecticut asked if I would teach a course in labor law," he said. "I taught as an adjunct for four-and-a-half years. I really liked it a lot and gained a lot of experience in practice at the same time."

During that time, his law firm was growing at the rate of one new lawyer per year. But in 1974, after a number of years as a successful attorney, he traveled back to his home state to take the Florida bar exam. Afterwards, he visited his sister Suzanne, who then lived in Tampa. While on an afternoon drive together, the two decided to visit Stetson University College of Law.

"I had heard a lot about Stetson and wanted to see it," he recalled. "So we stopped by with no appointment, and there sits Dorothy Bishop at her same desk. I asked her if the dean was available. She gave me a rather serious look and said, 'Do you have an appointment?' I said, 'Well, no, actually I don't.' But she went in and talked to the dean and came back and told me the dean would see me. It was Dean Richard Dillon.

"During that conversation, Dean Dillon told me about a problem he had with a new federal law. It just so happened that was what I did in my practice. We sat down together with the problem and in about 15 minutes, I gave him the answer he needed. So that's the way we started our relationship C pure serendipity."

A few months later, Dean Dillon asked Gary Vause to join the Stetson Law faculty as assistant dean. Dean Dillon wanted someone who had a combination of teaching, publication, administrative and practical experience. The firm of Vause, Sullivan, Lettick and Schoen lost its founding partner, but the team would remain close friends.

When Dean Vause joined Stetson in August 1975, the student body was comprised of about 400 students. The school had three full-time administrators; the dean, assistant dean and business manager. "I handled anything the dean needed me to handle and taught one or two courses per semester," he said. "I enjoyed the combination of teaching and administration."

Stetson's faculty carried a very heavy teaching load, making it very difficult for members to find the time to publish articles. Most other law schools faced the same challenges in those days, Dean Vause said. "We subsequently made the decision, Dean Dillon and I, to hire faculty members who could bring more publication and scholarship to the classroom," he said. "We recognized the need to change the profile of Stetson."

Stetson's profile has changed significantly since then. Many programs were built out of a catalog of international contacts established by Dean Vause, who was frequently sought out by foreign governments and educational institutions to teach or lecture.

"I saw an important priority to develop a profile on the international scene for Stetson," he said. "Many law schools had developed summer abroad programs but we had none. We did not have graduate programs. We had an occasional speaker on international matters. I had taught international business transactions since 1985 and I could see that there was growing interest in that. I began to push hard for summer abroad programs, for formal exchange programs with foreign universities, for official visitation programs and for an LL.M. program in international law. They all came to fruition."

Dean Vause continued to pursue Stetson's international profile when he became associate dean of international programs in 1997, and when he was named Stetson's vice president and dean in 1999.

"The school has changed dramatically since my first days and has become much more competitive," he said. "As the years passed, law applicants became more demanding, and expected more for their investment. There are many more law schools now, 10 of them in Florida, so that has meant that law schools have had to give attention to matters they were able to neglect 25 or 30 years ago, such as student services or career placement."

"We have a very different attitude today. Stetson now has one of the strongest academic support programs in the country. Those types of changes have occurred in part because of competition, but also because of shifts in what society feels is important."

Dean Vause said Stetson now pays more attention to student services, to helping students in need, and to career placement and scholarships. "It is a much more caring environment, and I feel I had a part in that." he said. "I feel the law school is more business-like and professional about the way it does things, and is a much better steward of the resources it is given."

Dean Vause also took great pride

in the relationship that Stetson now maintains with its graduates, and enjoyed seeing grads come back to the campus to take part in the Stetson community.

"It makes you feel good to see people that you taught maintain a relationship with the institution." he said. "There is that very personal reason to maintain good alumni relations. Alumni help us in so many ways, not only monetarily. For example, they can recommend good students to us. I've seen this happen many, many times. A student who could go to any one of the top 10 law schools in the country would apply to Stetson because an alum had said, 'You ought to go to Stetson.'"

Alumni are also indispensable allies when it comes to making and maintaining long-term alliances for the law school. And, he said, alumni always benefit when the school's fortunes go up.

"That Stetson law degree is going to be there permanently," he said. "It will never change to any other school. If Stetson's reputation takes a nose dive, that degree takes a nose dive. If Stetson continues to go upward and improve its reputation, than the reputation of that degree improves, as well. It has the potential to be a mutually supportive and mutually satisfactory relationship."

During his 28 years at Stetson, he served as professor of law, assistant dean, associate dean, director of the Center for Dispute Resolution, associate dean of international programs, university vice president and dean.

In the years he was at Stetson, Dean Vause led a small Florida law school to national and international prominence. Along the way, he touched the lives of many students, faculty, staff, alumni and friends. He will be missed, but his legacy will live on.

Tributes to Dean Gary Vause

Tribute to Gary Vause– A Personal Remembrance

I knew Dean W; Gary Vause for almost twenty eight years. I respected and admired him as a teacher, a scholar, an administrator, a colleague, a mediator, an arbitrator, a builder, a visionary and most of all as a friend. Our lives were intertwined from the day he came to Stetson Law School in the fall of 1975, to assume the administrative duties of the Assistant Dean and teach labor and employment law , to his untimely death.

While he came to Stetson to increase his stature as a neutral in order to promote his burgeoning arbitration practice, he found that being the Dean was his life's aspiration and the most fulfilling career he could imagine.

In order to increase the stature of Stetson Law School in the academic community, Dean Vause created Centers of Excellence, including the Center for Labor & Management Dispute Resolution. He invited leaders in the legal community throughout Florida to serve on its Board, sponsored conferences with national speakers and published monographs on current topics. He called upon members of the Labor and Employment Law Executive Council to assist him in this effort and many of us, including Cary Singletary and me, served on this Board and donated our time to teach courses in labor and employment law, employment discrimination, women in the law, collective bargaining and alternate dispute resolution. He acted as a bridge between the academic community and the Bar and assured that everyone benefitted from this relationship.

While I knew Dean Vause as my professor in the 1970s, I knew him as an arbitrator and mediator in the 1980s. Cary Singletary, as IBEW Local 824 counsel and I, as Labor Counsel for GTE Florida (now Verizon), regularly appeared before Dean Vause. He was so admired by both the Company and the Union for his well reasoned decisions and conduct of our arbitration hearings that when GTE established a new company, both management and union officials consented to have Dean Vause conduct an election of the bargaining unit employees

In the late 1980s, Dean Vause's interest increasing focused on international law and the interplay between labor and international law. As he was fluent in Mandarin Chinese, Portuguese, and Spanish and had some working knowledge of Russian, he was able to travel extensively and lecture in Brazil, China and in the countries of the former Soviet Union. As I had now become General Counsel of GTE Data Services (now Verizon Data Services), and we were licensing software throughout the world, we used Dean Vause as a consultant with regard to many of our ventures in Latin America, Asia and Europe . In fact, in our contract with Portugal Telecom we listed him as our choice for an arbitrator ,for a three person panel..

While negotiating a contract in Moscow for telecommunications for the Caspian Sea pipeline drilling project, Dean Vause assisted us in dealing with our Russian and Chinese cobidders. The relationships he developed with lawyers, faculty, and community leaders enabled him not only to act as a consultant but also to establish Stetson's foreign study and exchange programs and the LL.M program in International Law and Business.

In the few short years that he had as Dean, he served the law school well. He established the new Tampa Law Center and Campus, launched the Evening Program, and expanded the joint JD/MBA, LL.M and the summer abroad programs. He was an admirable fund-raiser and was able to attract colleagues who were inspired by his vision. He was an outstanding teacher, scholar, arbitrator and the epitome of excellence as a Dean. We shall all miss him and are better for having known him. Most of all, I will miss him as a mentor, a colleague and a friend.

Leslie Reicin Stein, General Counsel
Verizon Information Technologies Inc.

Dean Gary Vause – A Genuine Gentleman

I first met Gary Vause in 1985, where I was to introduce him at a conference in Miami Beach. I clearly remember asking him if I was pronouncing his name correctly, and he replied that either of the versions that I had tried was all right with him. To me, this epitomizes one of the unique characteristics of Gary. In spite of his extraordinary credentials, he was thoroughly unpretentious. I can't describe the shock that I felt when hearing of his death. After all, only a few days before that, I had referred a reporter from the Tampa Tribune to him as Florida's most highly regarded public sector labor expert who would provide an objective opinion.

I grew to know Gary much better over the following years in supervising Stetson Law School interns, lecturing at his labor law class, and speaking at the Stetson National Labor Law Conference. Unlike any of the international caliber intellectuals that I have met, Gary was quiet, warm, and reserved. He was not withdrawn, but seemed to focus intensely in attaining information and on the needs of others. You would never know that he was the dean of a respected law school, well read and published, and fluently spoke several foreign languages. This is not to say that he was not highly motivated. To the contrary, he vigorously and effectively pursued each of his numerous goals with unusual success.

The thing that most impressed me about Gary was that he was truly a kind man. In the strongly divided world of labor law, where even those on the same side are competing for clients, I have become accustomed to criticism amongst practitioners. And perhaps this is one reason that Gary resigned from the practice of law to pursue academics. However, criticism among peers is certainly not limited to the private sector. I have seen my fair share of educators who levy some pretty hard shots, particularly those with ambition. But this was not Gary's style. I never heard Gary say anything negative about anyone else. He was simply above it and I respect him for that.

In closing, it is difficult for me to express how much I will miss Gary. It will be strange to not see him at meetings and conferences and to never again receive a call to teach a class. However, most of all, I will miss the fact that I can not just pick up the phone and seek guidance and advice from my most valued and highly regarded labor law expert. Farewell my good friend.

Stephen A. Meck
General Counsel
Public Employees
Relations Commission

Dean Vause — Tribute from a Former Student

When I was first approached to offer my reflections about Professor Vause (the title by which I first came to know him) I was very honored. I thought that, with so many positive recollections from my days at Stetson and my career since, words would flow effortlessly from my computer. However, the profound impact studying and working with Professor Vause had on my ability to achieve many of my personal and professional goals has made this effort an interesting reflection on my studies in law school and professional accomplishments since that time. .

I first met Dean Vause as a student at Stetson University College of Law. Dean Vause was the head of the Center for Labor Management Dispute Resolution and a significant reason in my selection of Stetson for my law school studies. On many levels, my recollection of law school has now become a pleasant nostalgic blur, except for certain instances, several of which relate directly to Dean Vause.

First of all, I recall Dean Vause as exceptionally respectful of students. Unlike many other professors who followed the "Socratic method," Dean Vause treated each of his students with respect and recognition of their efforts and their perspective on the subject matter. He was uniquely able to make relevant a variety of what, to many, seemed to be arcane labor laws with little or no relevance to today's workplace. He was insightful about current trends in the marketplace and how Board law and courts' interpretations would or could change business methods at the time and into the future. (As I had a career in the manufacturing sector before law school, his practical approach to understanding the "law of the shop" tempered by his business acumen, helped many of us to formulate skills we draw upon in serving clients even today.)

His numerous contacts with leaders in the field of labor and employment resulted in a virtual Who's Who of labor leaders offering to lecture to his classes. We had once in a lifetime opportunities to interact with them and learn from them all because of their respect for Gary and his dedication to his students.

I was fortunate enough to work with him on his book *Labor and Employment Law In Florida, Law, Policy and Practice, Vols. 1 & 2*. I learned not only theory and case law, but how valuable realistic problem solving was to clients. That lesson, among others I learned from him, has served me very well over the years.

While the passing of those who have special places in our lives and memories is never easy, Gary's presence is so very wide spread his influence will live on through his colleagues, students and friends. His nomination this year to the College of Labor and Employment Attorneys is particularly bittersweet. Although awarded the honor posthumously, those of us fortunate enough to work and study with him know it is well deserved and we will continue to work to honor his memory.

Karen M. Morinelli, Esq.
Stetson University College of Law
Class of 1989

Gary Vause — Legal Community Feels Loss

The labor and employment law community has lost a true giant with the passing of W. Gary Vause, Dean of the Stetson College of Law. I join in mourning his loss.

Gary Vause was a labor lawyer before labor law was fashionable. His impact in this State was felt soon after his move from Connecticut in the early 1970's, where he quickly established himself as a pioneer in the labor relations field in Florida. His two volume treatise *Labor and Employment Law in Florida,* was, for so many years, THE authoritative work on labor and employment law issues in this State, and was required reading for the Florida practitioner. During his tenure at Stetson, Dean Vause demonstrated the type of vision and intelligent courage that led to, among other things, the establishment of the Center for Dispute Resolution and, in the continuing education field, put Stetson on the map as one of the premier centers of professional education in the Nation.

Always quick to lend his advice and assistance to a cause, a colleague or a student, he preferred to do so behind the scenes, away from the spotlight. As one who was privileged to sit in his classroom, the practical and substantive knowledge Gary so generously imparted remain relevant today. It is perhaps Dean Vause's love for teaching and his respect for our area of practice that will leave the most lasting mark, as under his guidance several generations of labor lawyers were spawned at Stetson.

Since Gary's passing, much has been said and written regarding his contributions as an advocate, a neutral and a scholar. While he would surely shrug off such praise and would probably be embarrassed by it, it is certainly well deserved. But even more remarkable than his many professional accomplishments is the way Gary led his life: with decency, honor and humility. I will truly miss him.

Robert J. Sniffen
Moyle, Flanigan, Katz,
Raymond & Sheehan, P.A.
Tallahassee, Florida

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moval.[11] The Supreme Court stated that "the word 'maintain' enjoys a breadth of meaning that leaves its bearing on removal ambiguous at best."[12] Since the word "maintain" could mean to merely "bring" or "file," such language does not equal an express provision prohibiting removal. If an ambiguous term could be used to defeat removal, then the "express" language in the statute would have little meaning. The term "'Express provision' must mean something more than any verbal hook for an argument."[13]

The Supreme Court then compared the FLSA's "maintained" language to other statutes that expressly prohibit removal.[14] For example, 28 U.S.C. §1445 expressly prohibits removal of several different types of actions, including actions against a railroad and actions under state workers compensation laws. Congress has even amended 28 U.S.C. §1445 over the years to add new laws, including the Violence Against Women Act of 1994.[15] Although Congress could have added FLSA claims to this list, it has not done so to date. Congress has also expressly prohibited removal directly in various laws such as the Securities Act of 1933<16>, and the Interstate Land Sales Full Disclosure Act.[17] Congress did not do so in the FLSA.

The Supreme Court also clarified its prior statement in *Shamrock Oil & Gas Corp. v. Sheets* that Federal Courts should "scrupulously confine" their jurisdiction.[18] The Supreme Court distinguished Shamrock because it was decided before Congress added the requirement of an express provision against removal to 28 U.S.C. §1441(a). In fact, the Supreme Court confirmed that the plaintiff bears the burden of finding an express provision prohibiting removal.[19]

Further, the Supreme Court stated that if the *Breuer* plaintiff was correct, than other laws that use the same "maintain" language would not be removable, such as the Family and Medical Leave Act (FMLA) and the Age Discrimination Employment Act (ADEA). In fact, the broader impact of prohibiting removal of laws using the "maintain" language makes it "too hard to believe that a right to 'maintain' an action was ever meant to displace the right to remove."[20]

Conclusion

The Supreme Court confirmed that a defendant may remove a FLSA action to Federal Court if the plaintiff files it in State Court. This ruling will likely answer any questions about the removability of FMLA and other actions using the same " maintain" language.

Scott A. Fisher *is an associate with Fowler White Boggs Banker PA in Tampa, Florida, where he represents management in labor and employment matters. He received his degree, magna cum laude from the University of Pittsburgh School of Law in 1998.*

Endnotes:

1 28 U.S.C. ' 1441(a) (2003).
2 See 29 U.S.C. ' 216(b)(2003).
3 *Cosme Nieves v. Deshler,* 786 F.2d 445 (1st. Cir. 1986).
4 *Johnson v. Butler Brothers,* 162 F,2d 87 (8th Cir. 1947).
5 123 S.Ct. 1882 (2003).
6 *Id.* at 1884.
7 *See Breuer v. Jim's Concrete of Brevard, Inc.,* 292 F.3d 1308 (11th Cir. 2002).
8 *Breuer,* 123 S.Ct at 1884.
9 *Breuer,* 123 S.Ct at 1887, fn.3
10 *Id.*
11 *Id. at* 1885.
12 *Id.*
13 See S. Rep. No. 85-1830 (1958, reprinted in 1958 U.S.C.C.A.N. 3099, 3106.
14 *Breuer,* 123 S.Ct at 1885.
15 *Id., See e.g.,* 28 U.S.C. 1445 (1982),
16 15 U.S.C. §77v(a) (1982).
17 15 U.S.C. §1719 (1982).
18 *Breuer,* 123 S.Ct at 1886.
19 *Id.*
20 *Id.* at 1887

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suit under the False Claims Act (31 U.S.C.§ 3729 *et seq*.) when they provide false information in connection with federal grants and other federal funding. The FCA provides that "any person" who "knowingly presents or causes to be presented, to an office or employee of the United States Government, a false or fraudulent claim for payment or approval may be liable for a civil penalty, treble damages, and costs." A private individual, known as a relator, may bring a *qui tam* action under the FCA in the name of the government.

In 2000, the Supreme Court came to the opposite holding with regard to states – holding that they are not "persons" subject to the FCA. *Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000).* That decision was based on the punitive character of the treble damages allowed in the FCA. Nevertheless, the Court concluded this time that the damage multiplier also has a compensatory function; as such, the Court held that Congress did not repeal local government coverage in enacting the treble damage amendment to the FCA in 1986.

FMLA Protects State Employees.

***Nevada Dep't of Human Resources v. Hibbs,* 123 S. Ct. 1972 (2003).**

In *Hibbs*, a divided Court held that "including state employees within the protections of the Family and Medical Leave Act (FMLA) is consistent with the Eleventh and Fourteenth Amendments to the U.S Constitution." Specifically, the Court determined that Congress unmistakably and lawfully abrogated state immunity by proscribing facially constitutional conduct in order to prevent and deter unconstitutional conduct. The opinion's underlying rationale may surprise lawyers and lay people. Justice Rehnquist's majority opinion explained that the FMLA protects women against gender-based discrimination. Stereotypical thinking that women primarily care for family members results in discrimination against women. In adopting the FMLA, Congress sought to dispel the stereotypes by creating a leave benefit for both men and women. Thus, now that FMLA is the law, employers cannot avoid hiring females because of the outdated belief that they are more

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Section Bulletin Board

Seminars	Executive Council Meetings
Public Employment Labor Relations Forum (5398) October 23-24, 2003 Hyatt Regency Orlando Airport, Orlando Group Rate: $140 Cut-off date: October 10, 2003 Reservation Number: 407/825-1234	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 Hyatt Regency Orlando Airport, Orlando
Effectively Litigating Employment Law Claims (5397R) November 14, 2003 Sonesta Hotel & Suites, Coconut Grove Group Rate: $150 Cut-off date: October 17, 2003 Reservation Number: 305/529-2828	Thursday, November 13, 2003 - Coconut Grove 5:00 p.m. - 6:00 p.m. Meeting 6:00 p.m. - 7:30 p.m. Reception Sonesta Hotel & Suites, Coconut Grove
Labor Certification Review (5391R) February 26-27, 2004 The Rosen Plaza, Orlando Group Rate: $99 Cut-off date: January 30, 2004 Reservation Number: 407/996-9700	Thursday, February 26, 2004 - Orlando 5:00 p.m. - 6:00 p.m. Meeting 6:00 p.m. - 7:30 p.m. Reception The Rosen Plaza, Orlando
Advanced Labor Topics (5396R) April 30 - May 1, 2004 The Pier House, Key West Group Rate: $219 Cut-off date: April 2, 2004 Reservation Number: 305/296-4600	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 The Pier House, Key West

likely to use leave.

FLSA Removal: No Right to State Court.

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

In *Breuer*, the Court held that 29 U.S.C. §216(b) does not bar removal of a Fair Labor Standards Act (FLSA) suit from state to federal court. As such, the court affirmed the Eleventh Circuit and resolved a circuit court conflict.

Any civil action involving original federal court jurisdiction may be removed from state court unless Congress makes an express exception to removal. For example, 28 U.S.C. § 1445(c) prohibits removal of actions arising under state workers' compensation laws (regardless of diversity). The court held that Congress did not make such an exception in the FLSA.

Direct Evidence Not Required for Mixed Motive Jury Instruction

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

In *Desert Palace*, a unanimous Court held that circumstantial evidence of discrimination was sufficient to allow a Title VII plaintiff to ask for a "mixed motive" instruction. The court based its ruling on the language of Title VII as amended in 1991 and rejected any "heightened" requirement of "direct evidence."

Under Title VII and the ADA, a plaintiff may prevail and recover damages when discrimination is a motivating factor for the personnel decision in question. If an employer succeeds on an affirmative defense that the employees would have taken the action anyway (regardless of the unlawful motivation), the plaintiff may still prevail but with restricted remedies. *Desert Palace* therefore gives a plaintiff with direct or circumstantial evidence two ways to succeed. The employer may succeed only if discrimination was not a motivating factor.

Judge Thomas, writing for a unanimous Court, dispelled the notion that circumstantial evidence is ever inferior to direct evidence. In doing so, he quoted *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000), which holds that "evidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form of *circumstantial* evidence that is probitive of intentional discrimination.'"

ERISA - No Heightened Deference to Treating Physician

***Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965 (2003).**

The Employee Retirement Income and Security Act (ERISA) governs employer-sponsored benefits such as group health and long-term disability plans. In *Black & Decker*, the Supreme Court resolved a conflict among the circuits over the use of a so-called "treating physician rule" for resolving claims under of disability plans. The Court held that group disability plans need not accord special deference to the medical opinions of the beneficiary's treating physician.

The "treating physician rule" was developed for administration of the Social Security Act. The Court reasoned that ERISA (in contrast) deals with employer group plans, which may greatly vary from one to the other. The validity of a claim is likely to turn on plan interpretations. As such, plan administrators may not "arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician." But, says the Court, administrators are also not required to automatically accord such opinions special weight. Nor do they have a "discrete burden of explanation," when they credit evidence that conflicts with a treating physician's opinion.

Constitutional Limits on Punitive Damages Reinforced

***State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).**

Some punitive damage awards are too large to be constitutional under the Due Process Clause of the Fourteenth Amendment. *State Farm v. Campbell*, an insurance bad faith case, discusses the factors that may support a "constitutional" amount of punitive damages. As in previous cases, the Court reiterated the absence of a "mathematical formula" or "bright-line ratio." The Court also pointed out that it is "obvious" that single digit multipliers are more likely to pass constitutional muster. In the case at issue, the Court held that the punitive damages award of $ 145 million was excessive where full compensatory damages were $ 1 million.

Criminal Law Against Sodomy Fosters Discrimination Against Gay Individuals

***Lawrence v. Texas*, 2003 U.S. LEXIS 5013 (2003).**

In *Lawrence*, the Court held that a Texas statute making it a crime for persons of the same sex to engage in certain intimate sexual conduct in private violated the Due Process Clause of the United States Constitution, overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986). Beyond the Court's narrow ruling, Justice Kennedy's words about discrimination against gay individuals will likely be quoted in future legislative and judicial forums: "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons."

***Alexandra K. Hedrick** is with the firm of Hedrick, Dewberry, Regan & Durant, P.A. in Jacksonville, FL. She is certified in labor and employment law and serves as a mediator for all types of civil cases.*

copy editor sent another e-mail from the union offices to the employees using their work e-mail addresses. On August 22, 2000, the copy editor was issued a second written warning for the e-mails she sent in August. She was advised that she violated the company's communications policy by sending the union related e-mail to the employees.[15]

Both the general counsel and the union claimed that the company's communications policy was an over broad prohibition on the employees' rights to make solicitations under the NLRA. Both the general counsel and the union claimed that the employer's computers, including e-mail, constituted a work area.[16] The employer argued that it had the right to prohibit the use of its personal property, including its computers and e-mail system, for non-business purposes.[17]

The ALJ disagreed with the general counsel and the union in this case. Specifically, the ALJ noted that the Board has not addressed whether an employer owned e-mail system is a workplace "where an employer is prohibited from limiting all employees Section 7 solicitation."[18] The ALJ reiterated that the employer may limit the use of its communications equipment in a non-discriminatory manner without violating the Section 7 rights of its employees. The ALJ held that Guard Publishing's communication policy was not an overbroad no solicitation/distribution rule but a proper limit on the use of its equipment. [19]

Essentially, the ALJ took the view that the communications policy on its face was not overbroad as long as it was not enforced in a discriminatory manner. The ALJ then analyzed whether the employer discriminated against the copy editor when it found that her e-mails regarding union activities were prohibited while allowing all other types of solicitations to go on without any discipline.[20] The employer allowed all the other personal e-mails, including solicitations from other third party organizations such as the United Way and Weight Watchers, without disciplining the employees. The burden was on the employer to prove that it would have disciplined the copy editor in absence of her union activity, for sending out a non-business-related e-mail. Although the restrictive e-mail policy was valid on its face, it was applied in a discriminatory fashion as to the copy editor. The ALJ held that the employer's discipline of the copy editor for violation of the communications policy was a violation of §8(a)(3) of the Act.[21]

2. *Prudential Insurance*

In January, 2002, a petition was filed for a mail ballot election of certain employees of Prudential Insurance. Mail ballots were necessary because the election was for agents that were employed in various locations throughout the United States.[22] Significantly, after the petition was filed, the employer instituted a non-solicitation/distribution rule that prevented employees from soliciting any cause for any organization during working time on the company property or during the working time of the employees being solicited. This policy also prevented non-employees and outside organizations from soliciting employees or distributing literature on company property at any time. The company also had rules related to e-mail communications that stated that the Prudential e-mail system was to be used for business communications only. Prudential stated that the e-mail system was the sole property of Prudential.[23] Prudential acknowledged that the policy prohibited employees from using the e-mail system to communicate about various union matters. In fact, Prudential disciplined an employee for using the e-mail to send an anti-union, pro-employer message to other employees.[24] During the union campaign, Prudential denied the use of its e-mail system for pro-union purposes. However, Prudential used the same e-mail system to send messages to its employees to vote against the union during the campaign.[25]

On April 26, 2002, the employer won the election by the count of 811 to 748 with 41 challenged ballots. On May 6, 2002, the union filed objections to the election claiming that the solicitation, distribution and e-mail policies were overly broad and those policies were applied in a discriminatory fashion when Prudential was allowed to use e-mail to campaign but the union was not.[26]

During the hearing on the objections, the union presented evidence that Prudential Insurance allowed employees to use the e-mail system for non-business purposes, such as, birth announcements, company golf matches, retirement parties, and football tickets. However, unlike the ALJ in *Guard Publishing*, the ALJ in *Prudential Insurance* found this evidence to be unpersuasive.[27]

The ALJ focused extensively on the fact that agents were assigned to various field offices all across the United States and they were not the typical voting unit in one location. The ALJ went to great lengths to determine whether or not e-mail communications were solicitations or whether they were distributions or a combination of both.[28] The ALJ relied on *Republic Aviation* for the proposition that solicitations on non-working time, even though they were on the company's private property, were permissible.[29] The ALJ determined that e-mails do not fit squarely into either a solicitation or a distribution category and they should have their own rules and regulations. The ALJ held that the company's policy of prohibiting the employees from using the e-mail system to communicate with each other about union related material was overly broad. It interfered with the employees' rights under §7 of the Act.[30] The ALJ was careful to state that this case is unique because employees had limited access to each other due to their geographic limitations.[31] In a normal election, most employees are in an office or industrial setting so that they can communicate freely with one another during appropriate times. The ALJ was also persuaded by the fact that Prudential could campaign using the e-mail system and the union could not. The ALJ found that the disparity in communication between the company's ability to use the e-mail system and the union's inability to use it was a substantial advantage to the employer and it warranted a new election.[32]

III. Conclusion

The Board will need to carefully consider all of the various permutations that will come from their rulings in *Guard Publishing* and *Pru-*

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dential Insurance. Many of the prior e-mail Board decisions came out when the majority of the Board were Democrats. A Republican majority controls the current Battista[33] Board. The author anticipates that the current Board will adopt *Guard Publishing*'s holding that restrictive employer communication policies are lawful and not per se overbroad and reject the ALJ's holding in *Prudential Insurance*. The author also anticipates that the current Board will uphold *Guard Publishing*'s non-discriminatory application of the restrictive employer communication policy. If the Board upholds *Guard Publishing*, there are still many unanswered questions:

1. Can the employer still use the e-mail system to campaign and prevent the union access to the same technology? Employers will argue that the computer system is their property, just like telephones, fax machines, conference rooms, etc. so they should be able to use e-mail to campaign against the union. The unions will argue that the e-mail system gives employers an unfair advantage in all elections and it is discriminatory to prohibit them from accessing their potential membership;

2. Does an electronic bulletin board, controlled by the employer, provide the answer? Many employers have developed these to stop the personal e-mail flow and give employees a forum for selling furniture, giving away tickets, announcing various events, etc. but union messages have no place. The unions will claim the electronic bulletin board policy as described in this paragraph is discriminatory.

3. If employers are successful in restricting e-mails to business use, what happens when employees begin sending personal instant messages that the employer cannot trace?

The Board's decisions in these two cases will most likely be appealed and may eventually end up at the United States Supreme Court.

Steven D. Brown *is a partner in Williams Mullen's Richmond, Virginia office. Mr. Brown provides labor and employment advice to management and he defends employers in traditional labor matters as well as in employment lawsuits filed throughout the United States. Mr. Brown is a member of the Laborand Employment section of the Florida Bar.*

Endnotes:

1 Instant messaging is becoming a real problem for employers. Instant messages cannot be tracked the same way that e-mails can be in the workplace and most employers do not currently have the proper tracking software.

2 29 U.S.C. § 8(a)(1) states: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

3 As of May 27, 2003, these cases were still pending with the NLRB.

4 NLRB ALJ Dec. Case No. 36-CA-8743-1 *et al*, (February 21, 2002).

5 NLRB ALJ Dec. Case No. 22-RC-12173 (November 1, 2002).

6 Both opinions were reported without any page references. Therefore, all citations will be to the pages as they were printed from Westlaw. *Guard Publishing* began at page 2 and ended at page 12. *Prudential Insurance* began at page 2 and ended at page 11.

7 *Honeywell, Inc.*, 262 NLRB 1402 (1982) and *Container Corp*., 244 NLRB 318 (1979)

8 *J.C. Penney, Inc.*, 322 NLRB 238 (1996).

9 *Union Carbide Corp*., 259 NLRB 974 (1981).

10 *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

11 *Guard Publishing*, NLRB ALJ Dec. Case No. 36-CA-8743-1 *et al*, (February 21, 2002) at 3.

12 *See id*.

13 *Guard Publishing*, NLRB ALJ Dec. Case No. 36-CA-8743-1 *et al*, (February 21, 2002) at 4.

14 *Guard Publishing*, NLRB ALJ Dec. Case No. 36-CA-8743-1 *et al*, (February 21, 2002) at 3.

15 *See id*.

16 *Guard Publishing*, NLRB ALJ Dec. Case No. 36-CA-8743-1 *et al*, (February 21, 2002) at 6.

17 *See id*.

18 *See id*.

19 *See id*.

20 *Guard Publishing*, NLRB ALJ Dec. Case No. 36-CA-8743-1 *et al*, (February 21, 2002) at 6-7.

21 *Guard Publishing*, NLRB ALJ Dec. Case No. 36-CA-8743-1 *et al*, (February 21, 2002) at 7.

22 *Prudential Insurance*, NLRB ALJ Dec. Case No. 22-RC-12173 (November 1, 2002) at 2.

23 *See id*.

24 *Prudential Insurance*, NLRB ALJ Dec. Case No. 22-RC-12173 (November 1, 2002) at 3.

25 *Prudential Insurance*, NLRB ALJ Dec. Case No. 22-RC-12173 (November 1, 2002) at 4.

26 *Prudential Insurance*, NLRB ALJ Dec. Case No. 22-RC-12173 (November 1, 2002) at 2.

27 *Prudential Insurance*, NLRB ALJ Dec. Case No. 22-RC-12173 (November 1, 2002) at 3.

28 *Prudential Insurance*, NLRB ALJ Dec. Case No. 22-RC-12173 (November 1, 2002) at 6-8.

29 *Prudential Insurance*, NLRB ALJ Dec. Case No. 22-RC-12173 (November 1, 2002) at 6.

30 *Prudential Insurance*, NLRB ALJ Dec. Case No. 22-RC-12173 (November 1, 2002) at 9.

31 *See id*.

32 *See id*.

33 Robert J. Battista was appointed by President Bush and confirmed by the Senate on November 14, 2002. His term expires December 16, 2007.

rial flexibilities" not available to other federal agencies. When the American Federation of Government Employees (AFGE), the largest of the federal employee unions, saw itself losing a toehold in the emerging department, it argued reform wasn't necessary in a published report entitled "You Already Have the Flexibility You Seek."[18] Responding to the administration's assertions about the "poor performer problem," the AFGE report described 35 different examples of conduct that could get a federal employee fired, including "immediate removal from the workplace for serious misconduct."[19] Among the examples of misconduct that already can result in termination, the report lists "[a]ssault of a coworker, supervisor, or member of the public . . . Discourteous conduct . . . Gross insubordination . . . Engaging in threats, verbal or otherwise . . . Activities incompatible with federal employment . . . ."[20]

That all sounds reasonable enough. If employees can already be fired or disciplined for misconduct, why all the discussion about reforming the way agencies deal with poorly performing employees? The answer lies in a completely benign looking parenthetical in the AFGE report that acknowledges dismissals based on the sorts of misconduct listed above are "subject to employee appeals."[21] White House Press Secretary Ari Fliescher summed up the most often echoed criticism of the federal employee appeals process: "If somebody joins the federal civil service, it's often impossible to take any discipline action in a prompt fashion."[22]

Does the current system afford federal agencies the appropriate freedom to deal with problem, or poorly performing employees? Consider the following example.

Charleston AFB Case

Assume you're a manager in a federal workplace, and you're planning to do some performance feedback with one of your employees. It's not a disciplinary session, and you're not telling the employee she's in trouble. You're just doing what managers are required to do, tell the employee how she's doing on the job.

At the appointed hour on 1 October 1998, the employee shows up at your office with the local union president accompanying her. As an experienced manager, you're aware that employees are entitled to have a union representative present under certain circumstances, (misconduct meetings etc.), but as this is a routine employee feedback session, you tell the union president he needs to leave. Instead of leaving, he gets very angry, begins ranting and raving, starts to lose control, and approaches you. You retreat as much as possible within the confines of your office, but he ends up so close to you that his stomach is pressed up against you, forcing you to arch backward over a counter. He is so intimidating in his body language that an Administrative Law Judge (ALJ) who later hears witness testimony describing the event will conclude you could reasonably have feared being struck. He eventually relents, steps back, and then exits your office, leaving you understandably shaken.

How does your agency respond? Well, according to the U.S. Office of Personnel Management's handbook, *Dealing with Workplace Violence: A Guide for Agency Planners*, agencies should treat "[d]irect or veiled threats of harm . . . intimidating, belligerent, harassing, bullying or other inappropriate or aggressive behavior" as clear "warning signs of violence," and proclaims in bold letters "none should be ignored." The handbook goes on to encourage agencies to impose discipline for such misconduct.[23]

Impose discipline is exactly what management at Charleston Air Force Base, SC did. The agency proposed to suspend the union president for three days for perpetrating what constitutes an assault and battery under the law of most jurisdictions against the female supervisor who actually endured the incident described above. In response, the union filed an Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority (FLRA), the agency authorized to administer union law in the federal workplace. The union, arguing a time-honored principle in the federal sector labor law, contended the Air Force had violated the law by punishing the union representative for taking part in protected union activity.

Despite the fact that the ALJ who reviewed the case described the incident as an "attack," he nevertheless determined the attacker's conduct was protected activity for a union representative, and held the Air Force had broken the law by punishing him.[24] Further the ALJ ordered the agency to reimburse the union president three day's pay with interest, to clear his record of any mention of the incident, and to post copies of a page-long mea culpa (a "posting"), signed by the commander of the installation for 60 days "in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted."[25]

The Air Force appealed the ALJ's decision to the Federal Labor Relations Authority, a three-member panel of presidential appointees who interpret federal sector union law. In a two-to-one decision, the FLRA concluded that even if this were an assault and battery, that fact *would not be dispositive of the question* of whether the Air Force broke the law by punishing the supervisor's attacker.[26] Most astonishingly, the ALJ's reasoning, which the FLRA subsequently adopted when upholding the ALJ's decision, was predicated at least in part on what appears to be a "manager had it coming to her" doctrine. Specifically, the ALJ noted that the manager may have provoked the attack by asking the union president at the outset of the meeting if she could help him with something, a statement the ALJ

continued, next page

found to constitute "a question with patronizing overtones" that led to his "resulting feeling of frustration."

Federal agencies wishing to challenge an FLRA final decision in cases like the one described above may do so by appealing the decision to a United States Court of Appeals, and the Air Force did so. On 12 July 2002, in a sternly worded opinion, the U.S. Court of Appeals for the District of Columbia Circuit reversed the FLRA, ordering the FLRA to dismiss the ULP complaint it had issued against the Air Force, and to reinstate the disciplinary actions taken against the union president.[27]

The Need for Reform

So, back to the question of whether reform is really necessary in light of the AFGE report's claim that employees can already be fired for all sorts of misconduct, and that additional "flexibilities" are therefore not required. Although saying "a federal employee can be punished for misconduct" isn't factually inaccurate, it's a bit like saying anybody can grow up to be an astronaut. While both statements are true in the abstract, they gloss over mountains of details that turn these two basically reasonable sounding assertions into misleading and oversimplified exaggerations. As federal union law is applied today, it took nearly four years, three separate administrative or judicial reviews, two hearings, doubtless hundreds of hours in attorney and witness preparation time, not to mention incalculable lost productivity in the workplace, to get a decision that stands for the proposition that it's OK to discipline an employee who assaults another employee while in the workplace.

The newest reform legislation targets rules about other parts of the civil service system in addition to the employee redress processes, such as hiring, setting pay, and collective bargaining obligations. But it's abuses of the redress processes that provide the most outrageous examples for the reform-minded. It would be terribly unfair to assume that the typical federal sector union official condones the type of conduct perpetrated against the manager in the Charleston case. Indeed, the overwhelming majority would probably find it every bit as offensive as the Circuit Court. The problem has more to do with the axiom about a few bad apples spoiling the whole bunch.

According to the U.S. Office of Personnel Management's best estimate, less than four percent of the federal workforce are problem employees.[28] Nonetheless, study after government study decries the profoundly sweeping negative impact that small number of malcontents has on the federal workforce as a whole.[29] The statute that created federal union law is still based on an indisputably sound notion: ensuring employees are treated fairly, and giving them a voice in deciding how the work gets done serve the interests of government. At its inception it was a good law designed to encourage and foster labor-management cooperation in the world's largest workforce.

It's also hard to fault unions for pushing the envelope in the name of standing up for employees they represent. That's what unions do. What's landed federal labor in the path of the approaching storm isn't zealous union advocacy, but rather the progressively strained reasoning found in FLRA case law. As the agency charged with administering federal union law, it has so stretched and contorted the law beyond its intended purpose, it's ended up very effectively arming a relatively small number of ne'er-do-wells with an assortment of bureaucratic smart bombs, enabling a tiny cast of "poor performer" tails to wag entire organizational dogs. In so doing the FLRA has garnered the federal labor law notoriety among managers who've encountered it first hand as a sort of organizational sludge, the very existence of which renders efficient operation of a government agency a practical impossibility.

The extent to which current reform efforts will succeed is unclear. Any number of things could derail the process by the time this newsletter reaches your mail box. That's the way these things usually go. But whether the NSPS becomes law or not, one thing appears clear. With agency after federal agency vying for a seat on the "flexibility" bandwagon, it looks like rough weather ahead for federal unions.

Pete Marksteiner *has an L.L.M. in labor and employment law and seven years experience in related practice areas. He has authored several published articles on labor and employment law-related subjects, and is a frequent lecturer/trainer for federal sector attorneys and HR specialists on the subject of disability discrimination under the Rehabilitation Act and the Americans With Disabilities Act.*

Endnotes:

[1] This essay represents the personal opinion of the author, and in no way constitutes a position or opinion of the Federal Government, the Department of Defense, the Department of the Air Force, or any other governmental entity or agency.

[2] Referred to as the "Defense Transformation Act for the 21st Century", or more gener-

ally the "National Security Personnel System,"; See, *Byliner: Defense for the 21st Century, by Secretary of Defense Donald Rumsfeld*, http://www.iwar.org.uk/news-archive/2003/05-22.htm, "first appeared as Rumsfeld, *Defense for the 21st Century,* The Washington Post, May 22, 2003.

[3] See e.g., FDCH Political Transcripts June 3, 2003, *Headline: Donald H. Rumsfeld Takes Part in Panel Discussion on College Graduates and Their Attitudes Toward Public Service,* (Paul Volker, Chairman of the National Commission on Public Service, speaking at the Brookings Institution on 3 June 2003, "12 years ago . . . in the first Commission on the Public Service, where we had a rather elaborate commission, did a lot of research . . . [the] impact we had was, I think it's fair to say, limited.").

[4] See e.g., *Senate Panel Backs Overhaul of Defense Personnel Policies,* CQ Midday Update, Congressional Quarterly, Tuesday, June 17, 2003; See also *Human Capital – DoD's Civilian Personnel Strategic Management and the Proposed National Security Personnel System,* Statement of David M. Walker, Comptroller General of the United States, GAO-03-493T, at 17 (Describing the sweeping nature of the proposed changes, David Walker, Comptroller General, said "[t]he proposal is . . . unprecedented in its size, scope, and significance.").

[5] See e.g., Stephen Barr, *Bush's Plans for More Privatization Prompt Rally in Opposition,* The Washington Post, May 21, 2003, pg B2.

[6] For a comprehensive overview of the goals the Government Performance and Results Act is intended to further, See, GAO/T-OGC-00-9, *Managing in the New Millennium, Shaping a More Efficient and Effective Government for the 21st Century,* Testimony of David Walker before the Committee on Governmental Affairs, at 15 – 30.

[7] See e.g., Report to the President: The Crisis in Human Capital, Report by Senator George V. Voinovich, Chairman Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia Committee on Governmental Affairs, U.S. Senate, 106th Congress, December 2000

[8] Christopher Lee, *Pentagon Personnel Plan Questioned*, The Washington Post, April 30, 2003, Pg A21.

[9] C.f., Tanya Ballard, *Lawmakers grill Bush officials about Defense Personnel Changes,* GovExec Online, April 29, 2003.

[10] FDCH Political Transcripts, May 21, 2003 Wednesday, *Headline: Donald Rumsfeld, Secretary of Defense.*

[11] Supra note 11.

[12] See e.g., FPMI's FedNews Online, *Pay system needs reform now, says partnership president,* Wednesday, 2, 2003.

[13] See text of radio adds purchased by AFGE at http://www.afge.org/Index.cfm?Page=RumsfeldPlan&File=Ad_AboveTheLaw.htm

[14] Marksteiner, "Improving the Federal Employee Redress System," Labor Lawyer, Vol, 17, No. 3 Winter/Spring 2002.

[15] See e.g., *Kelley: Neglect of Employees' Needs led to Human Capital Crisis,* FPMI Online News, Friday April 11, 2003. ("Among the key problems, Kelly said, are inadequate pay, rising health care costs . . . and the constant concern that government jobs will be turned over to the private sector.")

[16] Brian Friel, *Feds Satisfied with pay, but not with management,* GovExec Online, March 25, 2003 ("81 percent of executives reported overall job satisfaction, compared with 74.8 percent of supervisors and 66.8 percent of employees. . . . Many of the survey results are identical or similar to results of both private sector and government workplace surveys over the last decade.") See also , "What Do Federal Employees Say? Results from the 2002 Federal Human Capital Survey," U.S. Office of Personnel Management.

[17] See e.g., supra note (Secretary Rumsfeld: "It is unacceptable that it takes us years to deal responsibly with employee theft and waste of taxpayers' money. If a private company ran its business that way, it would go broke, and it should."); See also supra note 18.

[18] *You Already Have the Flexibility You Seek, A Report by the American Federation of Government Employees (AFGE) on the Rights of Federal Managers in Structuring the New Department of Homeland Security*.

[19] Id.

[20] Id. at 7.

[21] Id.

[22] Jason Peckenpaugh, *Bush Warns Against Federalization of Airport Security,* GovExec. Online, October 27, 2001.

[23] Part I: Section 3, at 17 – 18.

[24] 2001 FLRA LEXIS 43; 57 FLRA No. 25.

[25] Id.

[26] Id.

[27] *Dept. of the Air Force v. FLRA,* 294 F.3d 192; (D.C. Cir. 2002).

[28] U.S. Office of Personnel Management, Poor Performers in Government: A Quest for the True Story, Office of Merit Systems Oversight and Effectiveness, January 1999 at page 4, citing "a 1978 [GAO] report entitled *A Management Concern: How to Deal with the Nonproductive Federal Employee.*

[29] See generally id.; U.S. Merit Systems Protection Board Working for America: A Report to the President and the Congress of the United States, July 1994; U.S. Merit Systems Protection Board, Federal Supervisors and Strategic Human Resources Management, Office of Policy and Evaluation, June 1998; Tanya B. Ballard, *Federal Workers' Job Satisfaction Level Declines,* GovExec Online, Daily Briefing, May 31, 2001.

The Florida Bar Continuing Legal Education Committee, the Labor and Employment Law Section and the City, County and Local Government Law Section present the

THE FLORIDA BAR

29th Annual Public Employment Labor Relations Forum

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location: October 23 - 24, 2003

Hyatt Regency Orlando • Orlando International Airport • 9300 Airport Boulevard
Orlando, FL • 407/825-1234

Course No. 5398R

THURSDAY, October 23, 2003

12:30 p.m. – 1:00 p.m.
Late Registration

1:00 p.m. – 1:10 p.m.
Opening Remarks
Jeffrey E. Mandel, Muller, Mintz, P.A., Orlando

1:10 p.m. – 2:15 p.m.
Federal and State Retirement Issues
James W. Linn, Lewis Longman & Walker, Tallahassee

2:15 p.m. – 3:10 p.m.
Ethical Obligations of Public Officials
Charles "Chris" Anderson III, Florida Ethics Commission, Tallahassee

3:10 p.m. – 3:25 p.m. **Break**

3:25 p.m. – 4:20 p.m.
Recent Developments in Affirmative Action
Deborah Crumbley Brown, Thompson Sizemore Gonzalez, Tampa

4:20 p.m. – 5:00 p.m.
Union Duty of Fair Representation
Stuart A. Rosenfeldt, Rothstein, Rosenfeldt, Dolin & Pancier, P.A., Ft. Lauderdale
Paul A. Donnelly, Donnelly & Gross, Gainesville

5:00 p.m. – 5:15 p.m.
Joint Executive Council Meetings of the City, County and Local Government Law and Labor and Employment Law Sections of The Florida Bar

5:15 p.m. – 6:15 p.m.
Section Meetings

6:00 p.m. – 7:30 p.m.
All Member Reception (included in registration fee)

FRIDAY, October 24, 2003

9:00 a.m. – 9:45 a.m.
Public Employee Relations Commission, Recent Developments and Questions and Answers
Donna Maggert Poole, Chair, Tallahassee
Jessica Varn, Commissioner, Tallahassee
Charles Kossuth, Jr., Commissioner, Tallahassee
Stephen A. Meck, General Counsel, Tallahassee

9:45 a.m. – 10:30 a.m.
Florida Commission on Human Relations Update
Derrick Daniel, Executive Director, Tallahassee

10:30 a.m. – 10:45 a.m. **Break**

10:45 a.m. – 11:15 a.m.
Is There Life After Labor Law?
Senator Rod Smith, Gainesville

11:15 a.m. – 12:00 noon
The Proposed Changes to the Wage and Hour Regulations: Clarification or Further Confusion?
Carmen S. Johnson, Muller, Mintz, P.A., Miami

12:00 noon – 1:30 p.m.
Lunch (included in registration fee)
"The Future of the Federal Mediation and Conciliation Service"
The Honorable Peter Hurtgen, Director, FMCS, Washington, D.C.

1:30 p.m. – 2:45 p.m.
The Health Insurance Portability and Accountability Act (HIPPA): Why Should Public Employers Care?
Renee Alsobrook, Department of Health, Tallahassee

2:45 p.m. – 3:00 p.m. **Break**

3:00 p.m. – 4:00 p.m.
State University System Update
Michael Mattimore, Allen, Norton & Blue, P.A., Tallahassee
Thomas W. Brooks, Meyer and Brooks, Tallahassee

4:00 p.m. – 4:45 p.m.
Mediating Public Sector Cases
Cary R. Singletary, Tampa
Jill S. Schwartz, Jill S. Schwartz & Associates, Orlando
James G. Brown, Ford & Harrison, Orlando

4:45 p.m. – 5:00 p.m.
Questions and Answers - Closing Comments

CLER PROGRAM
(Maximum Credit: 12.5 hours)
General: 12.5 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
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City, County & Local Govt.: 12.5 hours
Labor & Employment Law: 9.5 hours

Refer to Chapter 6, Rules Regulating The Florida Bar, for more information about the CLER and Certification Requirements.

Section Meeting and Reception

The Executive Councils of the City, County and Local Government Law Section and the Labor and Employment Law Section will meet at 5:00 p.m. on Thursday, October 23, 2003. Following the Executive Council meetings, a reception will be held from 6:00 p.m. - 7:30 p.m. and is open to all members of the sections and persons attending the seminar. Section members and persons attending the seminar are invited to attend the Executive Council meetings.

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A block of rooms has been reserved at the Hyatt Regency Orlando Airport Hotel, at the rate of $140 single/double occupancy. To make reservations, call the Hyatt Regency Orlando Airport direct at (407)825-1234. Reservations must be made by 10/10/03 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

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THE FLORIDA BAR CLE

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Course No. 5397R

8:45 a.m. – 9:00 a.m.
Introduction
Eric J. Holshouser, Jacksonville
Jill S. Schwartz, Winter Park

9:00 a.m. – 9:50 a.m.
It's No Honeymoon – Defense Strategies for the First 60 Days
Timothy B. Strong, Jacksonville

9:50 a.m. – 11:00 a.m.
Fair Labor Standards Act Collective Actions - Strategies and Procedures
U.S. Magistrate Judge Marcia M. Howard, Jacksonville
Dinita L. James, Tampa
David H. Spalter, Davie

11:00 a.m. – 11:10 a.m.
Break

11:10 a.m. – 12:00 p.m.
"To Move or Not to Move" The Art (not Science) of Motion Practice
David E. Block, Miami

12:00 p.m. – 1:30 p.m.
Lunch (included in registration fee)
Trials and Tribulations of Employment Law
Richard T. Seymour, New York

1:30 p.m. – 2:30 p.m.
Unique Aspects of Litigating With and Against the EEOC
Delner Franklin Thomas, Miami

2:30 p.m. – 2:45 p.m.
Break

2:45 p.m. – 3:34 p.m.
I Came, I Saw, I Testified – Preparing Witnesses for Trial
Robert S. Turk, Miami

3:35 p.m. – 4:30 p.m.
From Beginning to End – Techniques and Tips for Opening and Closing Arguments
Neil Chonin, Coral Gables

4:30 p.m. – 4:35 p.m.
Closing Remarks

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