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the Checkoff

The Florida Bar
Vol. XLVIII, No. 3
April 2009

The Labor & Employment Law Section

INSIDE:

SAVE THE DATE!

President's Showcase at the 2009 Florida Bar Annual Convention:

"Employment Law Overview for Law Firms and Law Practices"

(1046R)

June 25, 2009

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Supreme Court Expands Anti-Retaliation Protections for Workers Participating in Internal Investigations

By J. David Marsey and Robert J. Sniffen, Tallahassee*

D. MARSEY

J. SNIFFEN

The U.S. Supreme Court has expanded the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 to include workers who report unlawful employment practices during questioning in an internal investigation. *Crawford v. Metropolitan Gov't of Nashville & Davidson County*, 129 S. Ct. 846 (2008).

For over 30 years, federal anti-discrimination and anti-retaliation laws have protected employees who opposed illegal employment discrimination and those who made a charge, testified, assisted or participated in an investigation of employment discrimination. These provisions are generally referred to as the "opposition" and "participation" clauses. If an employer takes action that would dissuade a reasonable employee from coming forward to report illegal employment discrimination as a result of the employee's opposition to, or participation in an investigation of, the employer's illegal employment practices, the employer has illegally retaliated against the employee.

Prior to *Crawford*, courts consistently held that in order for one to "oppose" an illegal employment practice, an employee must have instigated or initiated a discrimination complaint. Therefore, one would not be entitled to anti-retaliation protections of the opposition clause unless the employee made the complaint initiating the investigation. The ruling in *Crawford* expands the protection of the opposition clause to employees who have not themselves filed a complaint, but instead, only answered ques-

See "Supreme Court" page 11

D.C. Seminar Planned for May 1 & 2

The **2009 ADVANCED LABOR TOPICS** seminar is being held in **Washington, D.C.** this year, and we have a great schedule of events planned in a wonderful location! We have managed to line up an impressive array of nationally-known speakers, including **Topper Thompson,** the Commissioner of the OSHRC; former Wage and Hour Administrator **Tammy McCutchen; Richard Siegel,** Associate General Counsel for the NLRB; and **Peggy Mastroianni,** EEOC Associate Legal Counsel, to name a few. We will end the seminar with a special treat, as **Robin Smith,** producer of the award-winning video "*Come Walk In My Shoes,*" based on the civil rights experiences of Congressman John Lewis, has agreed to present the video and answer questions afterward. For those of you unfamiliar with Ms. Smith, she began her producing career with Charles Kuralt on

See "D.C. Seminar" page 12

Employers Struggle to Maintain the Status Quo, but the Forces of "Labor Reform" are "Ledbetter"


A. FORST

We're still in the first 100 days of the Obama Administration and there have already been big changes in the world of labor and employment law, with more on the way. The first piece of legislation signed into law by the new President was the **Lilly Ledbetter Fair Pay Act**, which states that in cases where a past act of discrimination results in a continuing disparity in working conditions, the 180-day statute of limitations (or 300-day in "deferral" states) for filing a charge of discrimination resets each time the disparity is manifested. This bill amends a number of nondiscrimination statutes and the FLSA. It also overturns the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007), which held that the statute of limitations for filing an equal-pay lawsuit begins to run on the date the disparate rate of pay was established. Under the Ledbetter Act, each paycheck issued after an unlawful decision setting pay is considered a new act of discrimination, so the time for filing runs from the last date when such a paycheck was issued.

The fact that the Ledbetter Act was the first bill signed into law by President Obama brings to mind the fact that the FMLA was the first bill signed by President Clinton. Speaking of the FMLA, Congress is currently considering legislation to expand that Act to more businesses and employees and, via the Working Families Flexibility Act, to provide employees the right to request, once every 12 months, that their employers modify work hours, schedule or location.

In the meantime, the House passed the **Paycheck Fairness Act**, which amends and strengthens the Equal Pay Act of 1963. Under the current Equal Pay Act, once employees have provided *prima facie* evidence of sex discrimination, the burden of proof shifts to the employer to show that the difference in wages results from "any factor other than sex." The PFA would eliminate the "any factor other than sex" defense and replace it with a "bona fide factor other than sex" defense. Employers could use this "bona fide factor" defense only if they demonstrate that business necessity demands it. The defense would not apply where the employee demonstrates that an alternative employment practice existed that would serve the same business purpose without producing such wage differential and that the employer refused to adopt such alternative practice. The PFA would make employers liable for unlimited punitive damages in addition to compensatory damages in cases of sex discrimination in pay. The PFA would also make it easier to bring class action lawsuits in such cases.

So, lots going on! In an effort to keep our members abreast of all that is happening in the courts and, more importantly, Congress and the Administration, with respect to labor and employment law, the Section has commenced a monthly webinar series. Thus far, we have hosted a "crystal ball" discussion with former Solicitor of Labor Bill Kilberg, who went over the various changes to labor and employment laws being considered by the Obama Administration and Congress. We've followed this up with a January webinar discussing "Employment Issues Relating to Downsizing," presented by David Buchsbaum of Fisher & Phillips, and a February webinar discussing FLSA exemptions, presented by Richard Tuschman of Epstein, Becker & Green. The March webinar, presented by Thomas Smith of Jackson, Lewis, focused on NLRB issues, including the Employee Free Choice Act still under consideration. I once again thank David Block and Greg Hearing for their work on this webinar program. Elsewhere in this newsletter, there is information regarding the remaining webinars, including the upcoming April 14th "Critical & Proposed Issues under the FMLA," a real "blockbuster" presented by David Block of Jackson Lewis (get it?—Block; blockbuster).

In the meantime, if you've realized that the information in these webinars would be useful, well-priced, and would earn you CLE credit (all true!), you can order them from our Section's website, www.employmentlaborlaw.com.

The Section started 2009 with two excellent live CLE seminars, in addition to the Kilberg teleconference and the three webinars. Thank you and kudos to David Block and Susan Dolin for a well-attended and very informative Board Certification Review seminar. In case you're wondering, this seminar prepares lawyers for the Certification exam, but it has also become a popular means for L&E attorneys to rack up CLE credits and get a full overview of L&E law. I also send kudos to Ray Poole and Richard Johnson for hosting our first Tallahassee seminar, "A Most Excellent Overview of L&E Law," which was "particularly recommended for attorneys of public employers and employees." Appreciation is also directed to CLE Chair Greg Hearing and our Section Administrator Angela Froelich for their work on these seminars.

We have two more live CLE seminars before I hand over the gavel to Eric Holshouser in June. On May 1-2, we will be in Washington, D.C., for our Advanced Labor Topics seminar. Cynthia Sass and Bob Turk have put together a great program. The details are set forth elsewhere in this newsletter. I believe that this is only the third time that the Section has left the state for a CLE program (not counting Key West, which is arguably a different country or planet). The previous two times, I was the Program Chair (Washington in 2000 and New Orleans in 2002). I received good feedback on those earlier seminars, and I anticipate that our excursion this year will be no less well-received.

For the second consecutive year, the Section has been selected to present one of the two President's Showcase CLE Seminars at the Annual Convention of The Florida Bar. Our seminar last year was very well-attended and well-received and, as there has been so much going on this year in our practice area, I anticipate another good turnout. Our seminar will begin at 2:15 p.m. on Thursday, June 25, right before the Section's annual meeting at 5:00, which is followed by an excellent reception (if you

See "Chair's Message," page 6

Sweeping Changes to Family and Medical Leave Act

Effective January 2009

By Diana P. Scott and Matthew B. Hayes, Los Angeles

D. SCOTT

M. HAYES

On November 17, 2008, the United States Department of Labor published its final revised regulations implementing the Family and Medical Leave Act (FMLA). More than 750 pages in length, the new regulations mark the most significant and extensive changes to the FMLA since the statute was enacted 15 years ago. In addition to modifying and clarifying many of the existing FMLA regulations, the new regulations address military family leave entitlements recently enacted into law by the National Defense Authorization Act for FY 2008. The new regulations took effect on January 16, 2009. Some of the most notable changes to the voluminous regulations are highlighted below.

Changes to Definition of 'Eligible' Employee

The new regulations maintain the requirement that an employee must have worked at least 12 months and 1,250 hours to be eligible for FMLA leave. However, they clarify the effect a break in service may have on meeting the 12-month requirement.

Under the prior regulations, an employee could accrue the required 12 months of employment over an unlimited period of time, with numerous intermittent breaks in service. The new regulations provide that, although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of seven years or more need not be counted toward the qualifying 12 months of employment unless the break was required by military service or pursuant to a written agreement.

Changes to Definition of 'Serious Health Condition'

The new regulations retain the six individual definitions of "serious health condition" and further clarify what is required to satisfy several of those definitions.

For example, the new regulations address the definition of "serious health condition," which requires three consecutive days of incapacity plus "two visits to a health care provider." The prior regulations did not specify a time period within which the two visits to a health care provider must occur, resulting in employer confusion and conflicting court decisions. The new regulations clarify that the two visits must occur within 30 days of the beginning of the period of incapacity and that the first of the two visits must occur within seven days of the first day of incapacity.

The new regulations also address the definition of "chronic serious health condition" and its requirement of "periodic visits" to a health care provider for treatment. The prior regulations leave "periodic visits" undefined. The new regulations clarify that "periodic visits" means at least twice a year.

Changes to Employer Notice and Posting Obligations

The new regulations set forth four mandatory notices an employer must issue to employees regarding FMLA rights and obligations.

First, the new regulations maintain the existing requirement that a "General Notice" be posted in the workplace and placed in the employee handbook. But they enhance this "General Notice" requirement in several respects. For instance, in the event that an employer does not have an employee handbook, the notice must be distributed to each employee upon hire (not annually, as had been proposed). In addition, a covered employer must comply with the "General Notice" requirements even if it has no FMLA-eligible employees.

Second, the new regulations require employers to issue a personalized "Eligibility Notice" within five business days after either: (a) a request for leave; or (b) learning that the leave might qualify for protection under the FMLA.

Third, the new regulations require an employer to issue a written "Rights and Responsibilities Notice" at the same time as the Eligibility Notice.

Finally, once an employer has obtained sufficient information to determine whether an employee's leave will be protected by the FMLA, the employer must provide the employee with a "Designation Notice." The new regulations extend the deadline for providing the Designation Notice from two business days after obtaining sufficient information to five business days after obtaining such information. Of course, an employer may provide the Designation Notice at the same time it provides the Eligibility Notice and the Rights and Responsibilities Notice if it has sufficient information to do so concurrently.

Changes to Employee Notice Obligations

The prior regulations enable employees to wait up to two days after an absence commences to notify their employer of the need for FMLA-qualifying leave, depending upon the circumstances. Under the new regulations, except in "unusual circumstances," employees are required to follow the employer's usual and customary procedures for reporting a leave. Examples of "unusual circumstances" include: (a) no answer at the telephone number the employee called; (b) the company voicemail box is full; or (c) the employee was unable to use the telephone because he/she was seeking emergency medical treatment.

Changes to Medical Certification Process

Medical certification is the process by which an employee presents written proof that he/she or a family member has a serious health condition. The new regulations increase the time for an employer to request medical certification from two to five days after the employee gives notice of need for leave or, for unforeseen leaves, the date that the leave begins. The new regulations

See "Changes - FMLA" page 12

The Latest in Labor Law

By Bob Turk, Miami and Susan Dolin, Pembroke Pines

This is the actual, imaged audio transcript of a telephone conversation between Susan Dolin and Bob Turk on Monday March 15, 2009, 2:15 p.m.

S. DOLIN

B. TURK

[Phone Rings]

Susan: Hello?

Bob: Hey, Susan – it's me, Bob Turk. I just received an email from Shane Muñoz that he wants us to write an article about upcoming issues in labor law.

Susan: Are you kidding me! How desperate is he for articles? Why us, and where do we start?

Bob: Well, first we need to cover the Employee Free Choice Act – it was introduced in Congress last week, on March 10. Since we both represent employers, I don't think you and I are telling our clients how much better off they are going to be if the EFCA becomes law.

Before the economic crisis, everyone thought this would be the first bill that Obama was going to sign. It's sitting in Congress now, but I don't think its going to come out for a vote soon.

Susan: I disagree. The unions spent a lot of money supporting Obama, and they want the EFCA to become law now. It's their lifeline. Why else do you think they had the gall to come to Congress when it was considering bailing out the auto makers, declaring that they were not going to give any concessions?

This bill, if it passes, is going to do a number of things. First, and probably worst of all, is that it does away with secret ballot elections. Instead, there will be a "card certification check" conducted by the NLRB. That's utterly crazy! That's just about 70 years of labor jurisprudence down the drain.

The Board itself has never trusted card checks; that's why there's no "certification year" for a voluntarily recognized union, just a "reasonable time" which is usually 6 months. And what about such black letter law as *Hollywood Ceramics*? If the union organizer hands the potential unit member an authorization card and says, like they always do, "Just sign this; it's just to get an election," what happens?

Bob: I believe once the card is signed, it's signed. The question also becomes where the cards are going to be signed. Employees can solicit each other during non-work time and at any time before or after work. Unions can even go to employees' homes and get cards signed. I know employers are very concerned about the pressure unions can bring to bear in trying to convince an employee to sign a card.

However, with new technology, solicitations might take place on Facebook, Twitter, cell phones, etc. In the future, might employees sign cards electronically, over the Internet? If that happens, how does the NLRB confirm the signature? There is no answer right now.

Susan: For now, employees cannot solicit each other by using company email under *Guard Publishing*, 351 NLRB 1110 (2007). However, the new NLRB could reverse that decision.

Bob: The EFCA also requires that once a union is certified through a card check, the union and employer will have 90 days to bargain. If they cannot come to terms, they must mediate using a FMCS mediator. If the parties still cannot finalize a collective bargaining agreement after the expiration of a 30-day mediation period, the parties go to a FMCS "arbitration board." How is this type of interest arbitration going to work under the EFCA?

Susan: If the parties can't reach agreement, at least for the first contract, it goes to interest arbitration instead of into the good old- fashioned slugfest of impasse, strikes and lockouts. So some arbitrator is going to write the CBA for them and shove it down everyone's throat! And that's supposed to be subject to the two-year contract bar? I'd fight that one.

Bob: The system wasn't set up that way; it's supposed to be governed by the forces of the marketplace. I do not see how an arbitrator can come in out of the blue and dictate to both the union and employer the terms of their first collective bargaining agreement. There is no telling what either party is going to get – it may not be a box of chocolates. Employees could be very surprised at the collective bargaining "sausage" that an arbitrator may make. I think interest arbitration is as much a radical idea as doing away with secret ballot elections.

The EFCA will also increase the NLRB's authority. It includes mandatory application for an injunction by the NLRB to a federal court to reinstate employees fired for union activity. It also requires treble back pay damages for employees who are discriminated against as a result of union activity. The ECFA even calls for civil penalties of up to $20,000 for each "willful or repeated" unfair labor practice while employees are seeking representation or collectively bargaining. What's your take on this?

Susan: Really, the only thing I agree with is the liquidated damage provision. The Act really does need more teeth. I remember all those *J.P. Stevens* cases where the courts allowed extraordinary damages since they were such a recidivist employer, like reimbursing the union its organizing expenses and the Board its attorneys' fees, although that last one came out to be about $50 per hour on our salaries. But really, posting notices just doesn't cut it. I don't agree with treble damages, but there needs to be an increase because now there's very little incentive to obey the law.

Bob: I am concerned there is going to be a dramatic increase in the number of employees who will now claim they were terminated for "union activity" because of the damage awards and increased pressure that can be brought to bear against employers.

Susan: I agree. This might become the "Labor Lawyers' Relief Act of 2009." Don't tell my employer clients I said that.

Bob: Well, we almost agreed on everything. How novel! But I think President Obama has told the unions to stay cool for a while. EFCA is going to be sitting in committee for a long while, until the economy gets better. President Obama is going to appoint pro-union people to the NLRB. Liebman is already chair, and Hilda Solis is the new Secretary of Labor - she is the daughter of a former union organizer. So the message to the unions is that the NLRB and Department of Labor are swinging their way.

There is opposition to taking away employees' right to vote in secret whether they

want to join a union. If the EFCA does come out of committee in Congress, I bet it will be modified to still require employees to vote on union representation, but the elections may take place in a much shorter period of time. Now, if an election is scheduled and there are no issues about the bargaining unit, it takes about 42 days at most from the time of the filing a union petition for representation to the time for the employees to vote on whether they want a union.

The ECFA, if modified, might shorten the period from 42 days down to, say, 5 days. In this way, employers will have a much shorter time to campaign. I also hope the arbitration requirement falls by the wayside.

Susan: I agree about arbitration - I don't think it will work. And you could be right about the election, but that still doesn't give the employer much time for campaigning. I think every single employer out there ought to be thinking about union avoidance *before* they get hit! That way they're ready if it does come.

Bob and Susan: Caveat Employer!

Susan: In a new wrinkle, Rep. Joe Sestak, D-Pa., recently introduced the National Labor Relations Modernization Act, H.R. 1355. The bill would increase back pay awards (including double damages) and civil penalties on employers who commit unfair labor practices. It would also require mediation and arbitration of new collective bargaining agreements. It retains the right to a secret ballot election, but it requires the employer to give notice to the NLRB of "any activities the employer intends to engage in to campaign in opposition to recognition of the [union]." The union would then be given equal access to the workplace to conduct a similar campaign.

Bob: Susan, do you have any idea what Congress is going to do? I don't think you do.

Susan: Bob, you ignorant slut! I know that the Republicans are going to fight the EFCA bill tooth and nail. They have introduced their own competing bill, named the Secret Ballot Protection Act (H.R. 1176), which would protect employees' right to a secret ballot union election. It also would make it unlawful for an employer to bargain voluntarily with a union that has not been chosen in a secret ballot election. That takes care of *Linden Lumber*!

Bob: Now let's talk about some upcoming cases at the NLRB. For example, the Bureau of National Affairs recently listed a number of important labor cases that are awaiting Board or court decision.

Susan: I saw that article. The *Dana Corp.* case, 351 NLRB No. 28, was decided by the Board in 2007. The issue was the legality of a union and employer entering into a neutrality/card check agreement that also sets up a precondition "potential bargaining agreement." This is a hot issue since the Republicans are pushing back on neutrality agreements.

Bob: There are also two significant handbilling cases pending at the Board as well. In *New York New York Hotel LLC d/b/a New York New York Hotel & Casino*, 334 NLRB 762 and 772 (2001), *enf. denied and remanded*, 313 F.3d 585 (D.C. Cir. 2002), the question is whether the Hotel committed an unfair labor practice by prohibiting handbilling of employees of a lessee/restaurant in certain non-work areas. In *Wal-Mart Stores, Inc.,* the issue is whether allowing charities and other social service organizations to solicit at store entrances gives a union the right to handbill in the same location.

Susan: Yes, in the *New York New York* case, the issue was whether a property owner can prohibit access to employees of a subcontractor who work "regularly and exclusively" on the property owner's premises. The NLRB found that the employer must show sufficient business justification, *i.e.,* that it was necessary to maintain production and discipline, to curtail conduct of subcontractors who regularly and exclusively work on the employer's premises and who are not trespassers. The Court determined that the Board failed to give adequate rationale for allowing a subcontractor's employees the same access rights as the property owner's employees. I think the outcome will depend on who is on the Board when they decide the issue.

Bob: I can't wait! It will be like the old days. Susan, great talking to you. I will see if I can draft something up for *The Checkoff*. We are all going to have a very busy year on labor issues.

Susan: Great talking to you, too, Bob. Bring back the Pinkertons! Ciao!

Robert S. Turk *is a Shareholder in Stearns Weaver, Co-Chair of the firm's labor and employment department, and Board Certified by The Florida Bar in Labor and Employment law. He practices in the areas of employment litigation, supervisory training, employment audits, equal employment opportunity claims, affirmative action, wage and hour representation, union avoidance, wrongful discharge, employment and union contracts, trade secrets contracts, non-competition agreements, employment policies, drug-free workplace policies and representation of unionized employers in collective bargaining. Mr. Turk received both his undergraduate degree and his law degree from the University of North Carolina.*

Susan L. Dolin, *of Dolin Law Group, is Board Certified by The Florida Bar in Labor and Employment Law and specializes in employee benefits and labor-management relations. Prior to opening her own firm, Ms. Dolin was a Shareholder with Rothstein Rosenfeld & Adler; was a Senior Partner and head of the labor and employment practice group at Muchnick, Wasserman, Dolin, Jaffe & Levine; and taught labor and employment law at Nova University. She also previously served as a trial attorney with the National Labor Relations Board. While Ms. Dolin primarily represents management, she also handles a limited number of cases on behalf of deserving employees.*

have ever been to a Bar Annual Convention, you know there is a lot of reception "grazing" in the evening—our reception has been deemed one of the most grazable!).

Please remember to check out our website, http://laboremploymentlaw.org. You can find links to our earlier seminars, teleconferences/webcasts, and past editions of *The Checkoff*, and you can also register for upcoming CLE programs. In the meantime, please do not hesitate to contact the Section's officers if you would like to become more involved with the Section by becoming a member of one of our committees, by sponsoring or advertising, by writing an article for *The Checkoff* or The Florida Bar *Journal*, or by attending our Executive Council meetings. We intend to produce one more *Checkoff* this "Bar year," with a mid-May deadline for submissions. So, if you have a story idea, please submit it to our most excellent editor, Shane Muñoz.

The Section is by no means the property of a select few; our leadership is constantly evolving and certainly open to all. In fact, the Board of Governors of The Florida Bar has recently approved our changes to the Section's by-laws. These changes go into effect in June, and it is my hope that they will open up more opportunities for members to become involved with the Section. If you are interested in being on the Executive Council, get involved now and in the coming year. We choose Council members and officers based on their record of participation.

Our country and our state are going through a very difficult period. I expect that "tensions will mount" in a fashion we may never have seen before, as businesses continue to struggle. Employees are likely to bear the brunt of these struggles, as there will be reductions in force, employers will be less forgiving of poor performers, and unemployed individuals will have more difficulty in finding a new job. At the same time, the new labor and employment laws, while unlikely to be welcomed by businesses, will likely give employees new opportunities in organizing and in litigation. As a result, one would expect more acrimony and shorter fuses from the participants in employment litigation, including the judges and hearing officers who are overworked and relatively underpaid (more work volume does not translate to higher wages; trust me, I know!). Please, please, do not let your clients' anxiety affect your professionalism. Treat the other party and his/her attorney with patience and respect, and extend that courtesy to the judge or appeals referee assigned to your case—they are also under new pressure. We'll ultimately get through this terrible economic period (at least that's what my stockbroker keeps on telling me but, then again, he's had a pretty good run at being wrong). We may (likely!) have lost some retirement funds; let's ensure we don't lose our peers' respect. Until we meet again, be healthy, wealthy and wise and remember, today is the greatest day.

— Alan O. Forst, Chair

Section Bulletin Board

Mark your calendars for these important Section meetings & CLE dates!

For more information, contact Angela Froelich:
850-561-5633 / afroelic@flabar.org

APRIL 14, 2009

Critical & Proposed Issues Under the Family and Medical Leave Act (FMLA) (0844R) *
Audio Webinar
(12:00 noon – 1:00 p.m.)
David E. Block, Jackson Lewis LLP, Miami

MAY 1 & 2, 2009

Advanced Labor Topics 2009 (0784R)
***Grand Hyatt, Washington, D.C.**
Executive Council Meeting:
Friday, May 1, 5:00 p.m. – 6:00 p.m.
Group Rate: $209 / Cut-off: 04/02/09
Reservation Number: (202) 582-1234 or (800) 233-1234

MAY 12, 2009

Reconciling Diversity with EEO (Ethics Credit) (0846R) *
Audio Webinar
(12:00 noon – 1:00 p.m.)
Roger Clegg, President and General Counsel, Center for Equal Opportunity, Washington, D.C.

MAY 13 - 16, 2009

27th Annual Multi-State Labor & Employment Law Seminar
May 13 (Welcome Reception)
May 14-16 (Program)
San Antonio, TX
On-line Registration: www.law.tulane.edu/cle

JUNE 9, 2009

Recent Changes to the American with Disabilities Act (ADA) (0831R) *
Audio Webinar
(12:00 noon – 1:00 p.m.)
Carol Miaskoff, Assistant Legal Counsel, Equal Employment Opportunity Commission, Washington, D.C.

JUNE 25, 2009

Employment Law Overview for Law Firms and Law Practices (1046R) *
Presidential Showcase at The Florida Bar Annual Convention
(2:15 p.m. – 5:00 p.m.) **
Orlando World Center Marriott, Orlando, FL

Labor & Employment Law Executive Council Annual Meeting & Reception **
Orlando World Center Marriott, Orlando, FL
Executive Council Meeting: Thursday, June 25, 5:00 p.m. – 6:00 p.m.
Reception: Thursday, June 25 6:00 p.m. – 8:00 p.m.

AUGUST 28, 2009

Labor and Employment Litigation Seminar (0880R)
Hard Rock Hotel & Casino, Hollywood

OCTOBER 22-23, 2009

35th Annual Public Employees Relations Forum (PELR) (0934R)
The Peabody Hotel, Orlando
Group Rate: $189 / Resort Fee: $15
Cut-off Date: 10/1/09
Reservations: 1-800-732-2639

*** Find COURSE BROCHURES at www.laboremploymentlaw.org. Fax Registration to 850-561-5816.**

**** Find Florida Bar ANNUAL CONVENTION INFORMATION at www.floridabar.org.**

Eleventh Circuit

By Cathleen Scott, Jupiter

C. SCOTT

Agreement to Arbitrate Employment Claims

Lambert v. Austin Ind., 544 F.3d 1192 (11th Cir. 2008).

Applying basic contract interpretation principles, the Court held that the district court erred in denying the employer's motion to compel arbitration of the former employee's claims of race discrimination, age discrimination, and retaliatory termination. The employer had a company-wide, workplace dispute-resolution program and required new employees to abide by the program as a condition of employment. At orientation, the employer provided employees with a pamphlet stating that employees agreed to waive their right to "a trial in a court of law" and agreed to resolve their claims through the company's program. The Court indicated that the employer's arbitration policy was a valid and enforceable contract under Georgia state law, and the age and race discrimination claims presented by the plaintiff were precisely the type that he agreed to arbitrate through the company's arbitration policy.

FLSA – Attorney Fees

Sahyers v. Prugh Holliday & Karatinos, P.L., No. 07-00052-CV-T-30-MAP (11th Cir. March 3, 2009).

Plaintiff Sahyers appealed a district court order denying her request for attorney's fees and costs in her lawsuit under the FLSA. The Eleventh Circuit affirmed the order, ruling that the district court did not abuse its discretion when it decided that the reasonable amount of attorney's fees and costs in this case was zero. The district court based its decision on its inherent powers to supervise the conduct of the lawyers who come before it and to keep in proper condition the legal community of which the courts are a leading part. In this case, the plaintiff did not send a pre-suit demand letter to defendants before litigation. Although the FLSA has no pre-suit requirements, the court ruled that plaintiff's attorney had a duty to inform the defendant law firm, as a matter of professional courtesy, of the plaintiff's impending claim so that efforts could be made to resolve the dispute. By refusing to award attorney fees the court sought to discourage uncivil conduct, which is within the court's discretion. However, the appellate court cautioned that these decisions are fact-intensive and that they were not holding that pre-suit notice is usually required or even often required under the FLSA to receive an award of attorney's fees and costs.

FLSA Class Certification; Willfulness

Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233 (11th Cir. 2008).

The employer appealed from a $35,576,059.48 final judgment entered in a collective action by 1,424 store managers for overtime wages under the FLSA. In a lengthy opinion, the Court held that the district court's denial of the employer's motion to decertify the class was not an abuse of discretion because: (1) the district court properly followed the two-stage procedure for certifying a § 216(b) collective action and demanded even more evidence than required before certifying the case at the first notice stage; (2) the plaintiff store managers were similarly situated under § 216(b); and (3) the plaintiffs' claims could be tried fairly as a collective action. In addition, the Court held that the evidence adduced at trial was legally sufficient for the jury to find that the employer did not meet its burden of proving that its store managers had duties that were primarily managerial in nature to qualify them as executive employees under the FLSA. With respect to the finding that 163 of the 1,424 store managers opting into the case did not customarily and regularly direct the work of two or more employees, as required for them to qualify as executive employees for the purposes of FLSA, the Court concluded that no reversible error occurred. In addition, the Court held that the evidence supported the jury's finding that the employer willfully violated the overtime pay requirement of the FLSA, which extended the two-year statute of limitations to three years.

FLSA Exemption for EMTs Who Rarely Engage in Fire Suppression

Gonzalez v. City of Deerfield Beach, 549 F. 3d 1331 (11th Cir. 2008).

Twelve current and former employees of the city's fire and rescue department sued the city for unpaid overtime under the FLSA. Each plaintiff was employed as either a Firefighter/EMT or a Rescue Supervisor and rarely, if ever, was called on to engage in fire suppression. Rather, the plaintiffs' duties consisted of providing emergency medical assistance. When responding to fire calls, the plaintiffs typically attended to victims of the fire rather than fighting the fire itself. However, the plaintiffs conceded the "theoretical possibility" that they could be directed to engage in fire suppression and admitted that they would be subject to significant disciplinary action if they refused to obey. Citing *Huff v. DeKalb County*, 516 F. 3d 1273, 1279 (11th Cir. 2008), the Court affirmed the district court's determination that the plaintiffs had the "responsibility to engage in fire suppression" within the meaning of the FLSA and, thus, were not entitled to overtime compensation under the FLSA's overtime requirements.

FLSA Outside Sales Exemption - Obtaining Orders for Services

Gregory v. First Title of America, Inc., ____ F.3d ____, No. 08-10737 (11th Cir. Jan. 27, 2009).

The employee, who worked as a "marketing executive," appealed from an order granting the employer's motion for summary judgment. The district court found that the employee met the FLSA's "outside salesman" exemption and was therefore not entitled to overtime compensation. On appeal, the Eleventh Circuit affirmed, explaining that the employee's primary duty was to obtain orders for the employer's title insurance services. These duties included bringing in orders, causing the bulk of the employee's time to be spent outside the office, free from direct supervision, and performing work that could not be conclusively characterized as nonexempt. The Court further disagreed with the employee's argument that her work involved "stimulating sales" as opposed to "obtaining orders for services."

Retaliation - No *Prima Facie* Case Where Employee Failed to Report Alleged Harassment

Beal v. CSX Corp., ____ F.3d ____, No. 08-11487 (11th Cir. Jan. 21, 2009).

The Court affirmed the trial court's grant

continued, next page

of summary judgment on the employee's claims for retaliation and failure to hire. With respect to the retaliation claim, the plaintiff acknowledged in her deposition that she never reported or complained about the alleged harassment. As a result, she failed to establish a *prima facie* case of retaliation because she did not demonstrate that the employer was aware of her protected activity at the time of the alleged retaliation.

***Cathleen Scott** has a comprehensive employment law practice in Jupiter, Florida. She received her B.A. from Stetson University and her J.D. from Southwestern University School of Law. She is Board Certified by The Florida Bar in Labor and Employment Law.*

Federal Case Notes

By Cathleen Scott, Jupiter and Lonn Weissblum, Boca Raton

L. WEISSBLUM

Southern District of Florida

Fair Labor Standards Act - Enterprise Coverage

Galdames v. N & D Investment Corp., 21 Fla. L. Weekly Fed. D532a (S.D. Fla. Jan. 27, 2009).

Because the defendant's equipment and chemicals were from out of state, defendant was an "enterprise" covered by the FLSA under 1974 amendment extending FLSA coverage to employers with "employees handling, selling, or otherwise working on goods or *materials* that have been moved in or produced for commerce by any person.". The court refused to consider, in connection with motion for reconsideration of summary judgment entered for plaintiff, evidence that was available prior to entry of summary judgment but which defendant refused to present at that time.

Fair Labor Standards Act – Overtime, Enterprise Coverage

Exime v. E.W. Ventures, Inc., 21 Fla. L. Weekly Fed. D519a (S.D. Fla. Dec. 23, 2008).

FLSA's commerce requirement was satisfied because plaintiff and other employees handled interstate "materials" on regular and recurrent basis in performance of their daily job functions, and gross sales requirement was satisfied because defendants' annual gross sales exceeded $500,000 for the year in which alleged overtime violations occurred. Defendants argued that summary judgment was warranted, as "ultimate consumers" of interstate "goods" are expressly exempt from FLSA enterprise jurisdiction. The court decided that even though defendants' dry cleaning business served Florida customers only and purchased most, if not all, of its materials from local retailers, the employer was covered because the vast majority of defendants' equipment was manufactured outside Florida. The term "materials" broadens FLSA jurisdiction by substantially constricting the "ultimate consumer" defense and expanding enterprise coverage to virtually all employers, so long as the employer satisfies the $500,000 gross sales requirement. The court also decided a corporate officer, who managed the day-to-day operations and supervised plaintiff, was potentially subject to joint and several liability with corporate defendant under FLSA overtime provisions.

Age Discrimination in Employment – "Cat's Paw" Theory

Perez v. Saks Fifth Avenue, Inc., 21 Fla. L. Weekly Fed. D514a (S.D. Fla. Jan. 5, 2009)

Despite sufficient evidence to support a finding that plaintiffs' department manager harbored age animus against plaintiffs, there was insufficient evidence to support finding under the "cat's paw" theory of liability that the manager influenced the decision-maker, the regional director, such that the regional director became a mere conduit for manager's discriminatory bias. Plaintiffs failed to prove that age was a substantial motivating factor in the decision to terminate them, so judgment as a matter of law was entered.

***Lonn Weissblum** of the Law Offices of Lonn Weissblum, P.A., handles appeals in the Florida District Courts of Appeal, the Supreme Court of Florida, and the U.S. Court of Appeals for the Eleventh Circuit. He graduated with highest honors from the University North Carolina and with high honors from the University of Florida Levin College of Law, where he was an editor for the Journal of Law and Public Policy.*

District Courts of Appeal

By Scott E. Atwood, Atlanta

First DCA

S. ATWOOD

Unemployment benefits – Entitlement to Benefits after Resignation Letter

Porter v. Florida Unemployment Appeals Commission, 2009 Fla. App. LEXIS 133 (1st DCA, January 9, 2009).

In this case, Porter submitted a resignation letter to her employer which was to become effective two weeks later, on August 10, 2007. However, on August 7, her employer hired a replacement and instructed Porter to leave because it could not pay two people for the same job. Porter filed for unemployment benefits contending that she did not leave work voluntarily but was dismissed before the date her resignation was supposed to take effect.

The appeals referee found that Porter had voluntary quit her employment even though her employer dismissed her three days before the effective date established by her two-week notice of resignation. The Unemployment Appeals Commission ("UAC") affirmed. The 1st DCA, after concluding that Florida law had not addressed such an issue, analyzed other jurisdictions and adopted the view that an employee whose employer terminates his/her employment prior to the effective date of his/her resignation letter has not left work voluntarily and therefore cannot be disqualified from receipt of benefits on that basis, even for the period following the employee's intended date of departure.

Accordingly, the Court reversed the UAC and held that Porter was involuntarily discharged from employment on August 7, 2007, for reasons not related to misconduct connected wither her work. She therefore was entitled to receive benefits, notwithstanding the fact that she had submitted a notice of resignation to become effective on August 10, 2007.

Workers Compensation – Scope of Employment Coverage for Travel

Silva v. General Labor Staffing Services, Inc., 995 So. 2d 1107 (Fla. 1st DCA 2008).

Claimant worked for General Labor Staffing Services, Inc. ("General Labor"), a staffing company that provided workers to other companies and had an office in a strip mall. Claimant commonly met other workers at the parking lot of the strip mall at 6:00 a.m. After all the workers would arrive, claimant and the other workers would drive to the worksite which was located about three to five miles away. Any worker who drove his fellow co-workers from the strip mall to the job site was paid an additional amount for the driving. One morning, when the claimant was getting coffee from a lunch truck that was parked in the strip mall parking lot, he was robbed and shot in the cheek.

The First DCA found that pursuant to the so-called premises rule under Fla. Stat. § 440.09(1), the injury did not occur in the course and scope of employment because it did not occur on the employer's premises and did not fit into any of the common law exceptions to the rule. The court held that the "travel between" exception to the rule did not apply because claimant was not, at the time he went to the lunch truck to get coffee, traveling between the employer's office and the job site. Further, the Court held that there was no evidence that the employer habitually used the strip mall parking lot for a special purpose, controlled it, or excluded others from entry. Thus, the Court affirmed the Judge of Compensation Claims' order denying compensation.

Third DCA

Civil Procedure – Amendment of Pleadings

Dieudonne v. Publix Super Markets, Inc. (Fla. 3rd DCA, Nov. 19, 2008).

Employee filed charge of discrimination alleging discrimination in terms of employment. She subsequently resigned her employment, failed to amend her charge to address termination of employment, and then filed a one-count complaint alleging she had been unlawfully terminated because of her age. The trial court erred in dismissing with prejudice for failure to exhaust administrative remedies, because it was not clear that amendment of the complaint would have been futile.

Non-Compete Agreements -- Duration

Zupnik v. All Florida Paper, Inc. (Fla. 3rd DCA, Dec. 31, 2008).

Former employee had entered into an employment agreement with a two-year term. The agreement included a restriction on competition during the term and for 12 months after expiration of the term. After the two-year contract term expired, former employee continued working for employer for two more years as an at-will employee. The trial court erred in enjoining the former employee from competing, because "the restrictive covenants set forth in the employment agreement expired at the end of the two-year term."

Unemployment Benefits – Disqualifying Factors

Carson v. Florida Unemployment Appeals Comm'n (Fla. 3rd DCA, Jan. 14, 2009).

Claimant's disagreement with her employer over its "corrective action plan" was an isolated incident rather than misconduct, which did not disqualify her from receiving unemployment compensation benefits.

Fourth DCA

Non-Compete Agreements – *Ex parte* injunctions

Bookall v. Sunbelt Rentals, Inc. (Fla. 4th DCA, Dec. 3, 2008).

Issuance of an *ex parte* temporary injunction to enforce a valid non-compete agreement without notice was invalid where court's order failed to state explicit reasons why the order was granted without notice.

Public Employment – Discharge under Collective Bargaining Agreement

Blackwood v. Division of Administrative Hearings (Fla. 4th DCA, Jan. 5, 2009).

School board could not terminate employee based on her prior employment history, even though the employee committed numerous acts of inappropriate behavior during her career, where Administrative Law Judge specifically found that employee did not commit an act warranting discipline within the 20-day window before the commencement of disciplinary proceedings provided for by Collective Bargaining Agreement.

Fifth DCA

Unemployment Compensation – Jurisdiction

Presnell v. Unemployment Appeals Commission, 2009 Fl. App. LEXIS 254 (5th DCA, January 16, 2009).

Presnell, who lives in Brooksville, Florida, brought a claim for unemployment benefits against his former employer. The employer opposed the claim on the basis that Presnell voluntarily left his employment without good cause. The appeals referee sided with the employer, and the Unemployment Appeals Commission ("UAC") affirmed. Presnell appealed to the 2nd DCA, which transferred the matter to the 5th DCA.

continued, next page

WANTED: ARTICLES

The Section needs articles for *The Checkoff* and The Florida Bar *Journal*. If you are interested in submitting an article for *The Checkoff,* contact Shane Muñoz (813/318-5728) (*munozs@gtlaw.com*). If you are interested in submitting an article for The Florida Bar *Journal,* contact Frank Brown (813/273-4381) (*feb@macfar.com*) to confirm that your topic is available.

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Article deadline for next *Checkoff* is May 15, 2009.

CASE NOTES

As a preliminary matter, the 5th DCA first had to resolve whether it had jurisdiction over the claim. The Court noted that the evidentiary hearing was conducted by telephone, with the appeals referee located in Tallahassee, Presnell participating from Brooksville, and the employer's representative participating from an office in North Carolina. After analyzing *Fla. Stat. § 443.151* and applicable case law, the Court distinguished a recent decision of the 2nd DCA and determined that it had jurisdiction to hear any UAC appeal that was conducted by telephone as long as one of the parties to the hearing was participating from a location within its jurisdiction.

The Court then reviewed the evidence of record noting that while Presnell claimed he was constructively discharged because his employer had stopped giving him work to do, his employer claimed that there was a work "slow-down" due to the seasonal nature of the business and that Presnell voluntarily left his position before the work picked back up. Since the referee heard the conflicting evidence and found that Presnell had not carried his burden of demonstrating that there was good cause to leave his employment, the 5th DCA held that it was not its duty to reweigh the evidence and affirmed the referee's order.

Workers Compensation – Need for Pre-suit Notice

Bifulco v. Patient Business & Financial Services, Inc., 2009 Fla. App. LEXIS 8 (5th DCA, January 2, 2009).

Bifulco was employed by a nonprofit corporation established for the sole purpose of performing billing services for Halifax Hospital Medical Center, a special taxing district of the State of Florida. Bifulco was terminated by her employer after she had filed a workers' compensation claim, and subsequently filed suit alleging a claim for retaliatory discharge in violation of *Fla. Stat.* § 440.205.

The trial court granted summary judgment to the employer solely on the grounds that Bifulco had failed to comply with *Fla. Stat. § 768.28(6)*, which provides that a party may not bring an action against the State of Florida or one of its agencies or subdivisions without first giving pre-suit notice.

The 5th DCA determined that this statutory notice requirement only applies to actions alleging common law tort claims. Further, the Court held that although a retaliatory discharge claim under *Fla. Stat. § 440.205* is tort-like in nature, it is not a claim sounding in common law tort. Bifulco therefore did not have to provide pre-suit notice before instigating her lawsuit. Thus, it reversed the trial court's grant of summary judgment and remanded the case for further proceedings.

Scott E. Atwood *of Stout Walling Atwood LLC regularly counsels both public and private clients on various labor and employment and contract matters. He has an undergraduate degree, with honors, from Dartmouth University, a master's degree from the College of William and Mary and a law degree, with honors, from the University of Florida College of Law where he was Editor-in-Chief of the Florida Journal of International Law. He is a member of The Florida Bar and The Georgia Bar and maintains an active practice in both states.*

Judicial Feedback Program

The Judicial Feedback Program allows Bar members to share their thoughts, observations and recommendations with members of the judiciary as to how judges can improve their performance. The information is provided online, anonymously, to the individual judge directly.

In 2008, judges around the state received 259 responses in circuit court and 65 in county court via the online feedback form. While this has been helpful, greater participation would be of significant assistance to the judiciary.

The goal of the Program is to enable sitting trial judges to benefit from the experience of trial lawyers who appear before them. This can occur only if lawyers take the time to go online and share their thoughts with these judges. The Feedback Form can be accessed via The Florida Bar Web site at www.floridabar.org/judicialfeedback. Lawyers will need their Florida Bar password to complete the actual form.

The responses are confidential and personal to the judge only. Please take advantage of this opportunity to share your thoughts with specific members of our judiciary.

If you have questions, please contact:

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The CHECKOFF

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

tions regarding a complaint filed by another employee. Thus, passive opposition is now protected.

Similarly, in order for one to "participate" in an investigation into illegal employment practices, courts have generally required the investigation to be specifically conducted in response to a charge of employment discrimination pending with the Equal Employment Opportunity Commission. Although the *Crawford* ruling did not address this type of alleged protected activity, the decision to expand an employee's protections may signal the Court's willingness to expand employee protections further to include informal investigations where an official charge of discrimination has yet to be filed.

The consequences of the Court's decision will be far and wide. Following *Crawford*, employees who provide information in an internal investigation that supports, corroborates or otherwise alleges unlawful employment discrimination will be protected by the anti-retaliation provisions of Title VII. Given this decision, employers should take additional steps to document internal investigations for their protection and that of their employees. At the very least, employers should fully document the information obtained from each witness involved in an internal investigation to record not only who participated, but the substance of their statements.

Example 1: An employee is called as a witness during an investigation of a sexual harassment allegation against a company manager brought by a co-worker. The witness-employee has not complained of unlawful discrimination nor has she indicated her desire to do so. During her interview, she provides information corroborating the co-worker's claim of sexual harassment.

Example 2: An employee is called as a witness during an investigation of a sexual harassment allegation brought by a co-worker under the same circumstances as Example 1 above. During her interview, she does not provide any information corroborating the sexual harassment allegation but provides information that the alleged sexual harasser has been embezzling funds from the company.

In these examples, the importance of documenting not only the witnesses' participation in the investigation but also the *substance* of the information disclosed is apparent. In the first example, the witness-employee provided information corroborating an unlawful employment practice by the employer, i.e., that the manager in question was sexually harassing a co-worker. This disclosure would certainly entitle the witness-employee to anti-retaliation protections of federal law. Conversely, in the second example, although the employee reported the manager's misconduct, she did not allege conduct prohibited by employment discrimination laws, and therefore, the anti-retaliation provisions of Title VII would not apply (note, however, that the second employee might be afforded whistleblower protections under other laws, such as one of Florida's whistleblower acts, or the Sarbanes-Oxley Act).

It may also be advisable for managers or human resources personnel to include a review of internal investigations prior to taking adverse employment action in order to identify those employees who may be protected as a result of their involvement as witnesses in an internal investigation. Regardless of the specific steps taken, employers should review their policies and procedures and update them accordingly to minimize the risk of incurring a Title VII retaliation claim as a result of witness participation in internal investigations.

Crawford will likely lead to a dramatic increase in the number of retaliation claims filed by disaffected employees and former employees. The decision also signals the Court's willingness to continue to expand the scope of the retaliation provisions of federal EEO statutes.

**J. David Marsey and Robert J. Sniffen are attorneys with Sniffen Law Firm, P.A. The firm submitted an amicus brief in the Crawford case on behalf of the National School Boards Association.*

***J. David Marsey** practices in the areas of employment litigation, civil rights defense, general tort and insurance defense, and commercial litigation. He received his undergraduate and law degrees from Florida State University. Mr. Marsey graduated with high honors from the FSU College of Law, where he served as articles selection editor for the Law Review.*

***Robert J. Sniffen** is Board Certified by The Florida Bar in Labor and Employment Law. He represents employers statewide in federal and state courts and before administrative tribunals. He also provides advice to employers regarding personnel and workplace issues. Mr. Sniffen served as Chair of The Florida Bar's Labor and Employment Law Section from 1999-2000. He received his B.A. from the University of Florida and his J.D. from the Stetson University College of Law.*

also provide that when an employer deems a medical certification to be incomplete or insufficient, it must specify to the employee in writing what information is lacking and give the employee seven calendar days to cure the deficiency. If the employee fails to do so, the employer may deny the leave.

In a significant departure from the prior regulations, the new regulations entitle certain employer representatives to contact directly an employee's health care provider to authenticate or obtain clarification about information required by a certification form. The employer representative can be a health care provider, a human resource professional, a leave administrator (including a third-party administrator), or a management official; in no case may it be the employee's direct supervisor. Since the new regulations do not define these various positions, it may be difficult, particularly in smaller businesses, to distinguish a "management official" from a "direct supervisor."

Changes to Fitness-for-Duty Certification

Employers may require all similarly-situated employees who take leave to provide a certification that they are able to resume work. This is often referred to as a "Fitness-for-Duty Certification." The new regulations expand the information that an employer may require in a Fitness-for-Duty Certification in two respects. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of his/her job. Second, where reasonable job safety concerns exist, an employer can require a Fitness-for-Duty Certification before an employee may return to work from an intermittent leave.

Intermittent Leave

Under the new regulations, employers must account for intermittent leave using an increment no greater than the shortest period of time that they use to account for other forms of leave — provided that it is no greater than one hour. In addition, the new regulations allow employers in narrowly applied circumstances to designate an entire shift as FMLA leave if it is physically impossible for employees to start work midway through the shift.

Light Duty

Based on the prior regulations, some courts have held that an employee uses up FMLA leave while on "light duty." The new regulations provide that time spent performing "light duty" work does not count against an employee's FMLA entitlement and that the employee's right to job restoration is held in abeyance during the time that he/she performs the "light duty."

Implementation of Military Family Leave Rights

The new regulations also implement provisions of the recent FMLA amendments that provide two new military-related leave entitlements.

Military Caregiver Leave. The first new military leave entitlement allows eligible employees who are family members of covered service members to take up to 26 workweeks of leave in a "single 12-month period" to care for a covered service member with a serious illness or injury incurred in the line of duty. This entitlement extends FMLA protections to family members, such as next of kin, beyond those who may take FMLA leave for other reasons.

Qualifying Exigency Leave. The second new military leave entitlement allows an employee to take up to 12 workweeks of FMLA leave to handle certain non-medical exigencies arising from the fact that the employee's spouse, son, daughter, or parent in the National Guard or Reserve is on active duty or called to active duty status. The new regulations specify eight types of "qualifying exigencies" that merit this type of FMLA leave: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities not encompassed in the previous categories that arise out of the covered military member's active duty or call to active duty status and to which the employer and employee agree.

Diana P. Scott *is a Shareholder in the Los Angeles office of Greenberg Traurig. She represents clients in litigation and trial of all types of employment disputes. She also prepares employment contracts, severance and partnership agreements, workplace policies and procedures manuals, and harassment and discrimination policies. Ms. Scott has a B.A. from the University of California at Berkeley and a J.D. from the University of the Pacific, McGeorge School of Law. She frequently lectures and writes on employment law issues.*

Matthew B. Hayes *is an Associate in the Los Angeles office of Greenberg Traurig. He graduated Phi Beta Kappa from the University of Virginia and received his law degree from the University of California at Los Angeles. Mr. Hayes' practice focuses on employment litigation and counseling. He has litigated numerous class action and single plaintiff lawsuits concerning a variety of employment disputes. He also has significant experience in advising employers regarding matters of employment law.*

CBS Sunday Morning and later worked with Roger Mudd and Connie Chung at NBC News on *American Almanac* and *1986*.

Of course any trip to D.C. needs some sightseeing, and we have arranged for a tour of the Capitol building and the U.S. Supreme Court, topped off with the opportunity to attend a performance of **The Capitol Steps.** We've secured a great rate at a hotel within walking distance of the Mall, the museums, and great restaurants.

We hope you can make it to the seminar, May 1-2, as it is sure to be an educational and delightful time. Bring the whole family-- this is the best time of year to visit our nation's Capital. Hope to see you there!!!

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11:30 a.m. – 12:45 p.m.
Lunch (on your own)

12:45 p.m. – 1:00 p.m. **Late Registration**

1:00 p.m. – 2:00 p.m.
Recent Developments at the National Labor Relations Board (NLRB)
Richard Siegel, Associate General Counsel, NLRB, Washington, D.C.

2:00 p.m. – 3:00 p.m.
What's the ADAA All About?
Peggy Mastroianni, Associate Legal Counsel, EEOC, Washington, D.C.

3:00 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:05 p.m.
Cutting-edge Issues on the FLSA, including Collective Actions
Tammy McCutchen, Employment & Labor Law Solutions Worldwide, Washington, D.C.

4:05 p.m. – 5:00 p.m.
Recent Developments in Safety & Health Law
Horace "Topper" Thompson, Commissioner, OSHRC, Washington, D.C.

5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting (all invited)

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

7:30 p.m.
Performance of The Capitol Steps (Cost is $39)
(To register please contact Angela Froelich at 850-561-5633 or afroelic@flabar.org. Seating is limited / Reserve your seat today!)

Saturday, May 2, 2009

9:00 a.m. – 10:00 a.m.
Update on Florida Law
Cathleen A. Scott, Cathleen Scott, P.A., Jupiter, FL
Scott E. Atwood, Stout Walling Atwood LLC, Atlanta, GA

10:00 a.m. – 11:00 a.m.
Title VII and Supreme Court Updates
Richard "Rick" Seymour, The Law Office of Richard T. Seymour, P.L.L.C., Washington, D.C.

11:00 a.m. – 11:15 a.m. **Break**

11:15 a.m. – 12:05 p.m.
Ethics in Discovery from a Plaintiff and Defense Perspective
Plaintiff Speaker: Guy Bennett Rubin, Rubin and Rubin, P.A., Stuart, FL
Defense Speaker: Richard C. McCrea, Jr., Greenberg Traurig P.A., Tampa, FL

12:05 p.m. – 1:05 p.m.
Come Walk in My Shoes, a Civil Rights Documentary
Robin Smith, Video Action, Washington, D.C.

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THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and The Labor and Employment Law Section present

Labor & Employment Law Audio Webinar Series

SPECIAL CLE SECTION

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Remaining Dates: April 14, 2009, May 12, 2009 & June 9, 2009

Course No. 0848R

Since January of this year, The Florida Bar Labor and Employment Law Section has been offering monthly webinars. Webinars provide an easy and affordable manner to earn CLE credits, listen to presentations (accompanied, in some cases, by written materials) by some of the top lawyers in the nation, from the comfort of your home or office. You can even e-mail us your questions during the presentation. We have an excellent faculty speaking on very timely subjects. There are discounts available for Section members and people ordering the entire series.

January 27, 2009

Employment Issues Relating to Downsizing (0858R)
David Buchsbaum, Fisher & Phillips LLP, Fort Lauderdale

February 10, 2009

A Primer on Fair Labor Standards Act (FLSA) Exemptions (0837R)
Richard D. Tuschman, Epstein Becker & Green, P.C., Miami

March 10, 2009

The Proposed Employee Free Choice Act & Critical Issues Related to the National Labor Relations Act (NLRA) (0843R)
Thomas Smith, Jackson Lewis LLP, Orlando/Miami

April 14, 2009

Critical & Proposed Issues Under the Family and Medical Leave Act (FMLA) (0844R)
Audio Webcast (12:00 noon – 1:00 p.m.)
David E. Block, Jackson Lewis LLP, Miami

May 12, 2009*

Reconciling Diversity with EEO (Ethics Credit) (0846R)
Audio Webcast (12:00 noon – 1:00 p.m.)
Roger Clegg, President and General Counsel, Center for Equal Opportunity, Washington, D.C.

June 9, 2009

Recent Changes to the American with Disabilities Act (ADA) (0831R)
Audio Webcast (12:00 noon – 1:00 p.m.)
Carol Miaskoff, Assistant Legal Counsel, Equal Employment Opportunity Commission, Washington, D.C.

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AT = Antitrust & Trust Regulation
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CA = Criminal Appeal
CC = City, County, Local Government
CL = Construction Law
CR = Criminal Trial
CT = Civil Trial
ED = Elder Law
EP = Wills, Trusts, & Estates
FL = Marital & Family Law
HL = Health Law
IL = International Law
IP = Intellectual Property
IM = Immigration & Nationality
LE = Labor & Employment
RE = Real Estate
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Revised 03/09

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LABOR & EMPLOYMENT LAW SECTION							
0584	8th Annual Labor & Employment Law Certification Review **CD Only**	**17.5**	**0**	LE = 17.5	02/28/2008-08/28/2009	**S = $275.00** **N = $300.00**	Not Available
0616	Advanced Labor Topics 2008 **CD & DVD**	**8.5**	**2.0 E**	LE = 8.5	05/09/2008-11/09/2009	**S = $220.00** **N = $245.00**	**S = $250.00** **N = $275.00**
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