IN THE SUPREME COURT
STATE OF FLORIDA

ROSARIO DONATO,

Plaintiff/Appellant,

vs.

Fla. Sup. Ct. Case No. 93,534
U.S. 11th Cir. Case No.: 97-2428

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Defendant/Appellee.
_____/

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

QUESTION CERTIFIED TO THE FLORIDA SUPREME COURT
BY THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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PRELIMINARY STATEMENT

Defendant/appellee American Telephone and Telegraph Company will be referred to as "AT&T."[1/] Plaintiff/appellant Rosario Donato will be referred to as "plaintiff."

The record is contained in an appendix supplied by plaintiff. References to the appendix will be designated by the letter "A" followed by a dash, a number, and, when necessary, either a page or paragraph number. For example, "A-1 ¶ 2" refers to tab 1, paragraph 2 of the appendix.

References to plaintiff's Initial Brief in this appeal will be to "In. Br. ____", the underlined spaces being replaced with a page number.

Unless otherwise indicated, all emphasis is supplied by AT&T.

[1/] American Telephone and Telegraph Company is currently known as "AT&T Corp." The particular business unit that formerly employed plaintiff is now known as Lucent Technologies Inc. In his Initial Brief, plaintiff refers to Lucent Technologies Inc., as "AT&T." For the Court's convenience, appellee will do the same.

STATEMENT OF THE CASE AND FACTS

Course of the Proceedings

Plaintiff alleged that AT&T discharged him in retaliation for the filing by his wife of a sex discrimination claim against AT&T. (A-1 ¶ 20). He claimed that his discharge constituted marital status discrimination in violation of the Florida Civil Rights Act. (A-1 ¶ 21). The federal district court dismissed that complaint, and, after choosing not to amend, plaintiff appealed the dismissal to the United States Court of Appeals for the Eleventh Circuit. The parties briefed the case and the court heard oral argument. Following oral argument, the Eleventh Circuit certified to this Court the following question:

> CAN AN INDIVIDUAL PROCEED UNDER THE FLORIDA CIVIL RIGHTS ACT BY ALLEGING THAT HE WAS DISCHARGED, IN VIOLATION OF THE PROHIBITION ON MARITAL STATUS DISCRIMINATION, BECAUSE HE IS MARRIED TO AN INDIVIDUAL WHO FILED SUIT AGAINST HIS EMPLOYER?

(A-7).

Statement of the Facts

AT&T adopts the statement of facts submitted by plaintiff.

SUMMARY OF ARGUMENT

This Court has long held that there is no cause of action under Florida common law for the retaliatory discharge of an employee. Although Florida has a statute prohibiting retaliation against those who make employment discrimination claims, plaintiff's claim of retaliatory discharge does not come within that statute since he does not claim he was discharged because he made a claim of discrimination. Indeed, he did not sue under that retaliation statute, electing instead to attempt to try to force his square peg retaliation claim into a round hole marital status discrimination claim.

Plaintiff's claim does not, as a matter of law, constitute marital status discrimination. As the federal district court emphasized in dismissing his claim, plaintiff does not contend that he was discharged because of his marital status -- married. Instead, he claims he was discharged because of the actions of the person to whom he was married. But terminating an employee because of actions taken by another -- even if the other person happens to be the employee's spouse -- does not constitute discrimination on the basis of marital status.

Everyone knows the plain, common and natural meaning of marital status. One's "marital status" is the condition of whether one is married, divorced, separated, widowed or unmarried. The term is so common and well understood that the legislature has used it in nearly 40 statutes, including over 25 anti-discrimination statutes, and never felt the need to define the term. The term is also found in over one hundred cases, always in the context of one's position with respect to marriage. Under the plain language of the statute, as well as decisions of this Court addressing other types of discrimination claims

under the statute, marital status discrimination only occurs where action is taken specifically because of a person's marital status -- that is, because the person is married, divorced, separated, widowed or unmarried.

Significantly, the Civil Rights Act prohibits discrimination based on race, color, religion, sex, national origin, age, handicap, or marital status -- each of which is a single, readily ascertainable characteristic. Like the prohibition outlawing religious discrimination, the prohibition on marital status discrimination reflects a policy of respecting choices people make with regard to a special and protected institution -- marriage.

The position urged by plaintiff in this case goes far beyond any rational view of the statute. By definition, marital status discrimination requires the alleged basis of the discharge to be at least in part the marital status held by the discharged employee. Where, as here, the alleged basis for the discharge is solely the acts of the employee's spouse, not the employee's marital status itself, there is no discrimination based on marital status. Numerous decisions of the Commission have dismissed claims on this basis, and the only Florida appellate court decision on this point has so held as well.

Simply put, to constitute marital status discrimination, the employee's marital status itself must -- in all events -- be specifically at issue, whether that is the sole basis or only part of the basis for the discharge. The question certified by the Eleventh Circuit should be answered in the negative.

ARGUMENT

Plaintiff's claim in this case is clear: he contends that AT&T terminated his employment in retaliation for Lynda Donato's act of filing a discrimination suit against AT&T. Under the "employment at will" doctrine, however, employers such as AT&T may discharge an employee for any or no reason at all. That common law rule provides that both an employee and an employer have the absolute right to terminate an employment relationship at any time and for any reason. E.g., Smith v. Piezo Tech. & Prof. Admr's, 427 So. 2d 182, 184 (Fla. 1983); DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253, 1254 (Fla. 1980).

As discussed more fully in Part IV of this brief, this Court has applied the employment at will doctrine and specifically held on at least four separate occasions that Florida law does not recognize a common law claim for retaliatory discharge. Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994); Scott v. Otis Elevator Co., 572 So. 2d 902, 903 (Fla. 1990); Smith v. Piezo Tech. & Prof'l Adm'rs., 427 So. 2d 182, 184 (Fla. 1984); ; DeMarco. This law is so settled that, more than a decade ago, one Florida court declared that to except retaliation from the employment at will doctrine would "abrogate the inherent right of contract between employer and employee", would "overrule longstanding Florida law and create uncertainty in present employer - employee relationships as to the rights of the parties", and could be "contrary to one of the basic functions of law": fostering certainty in business relationships. Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327, 1329 (Fla. 3d DCA 1985).

Florida common law is controlling in this case unless there is a specific statutory exception to the employment at will doctrine that applies to protect plaintiff from termination. There is none.

Most importantly, Florida's statute creating a claim for employer retaliation under the Act does not make AT&T's alleged retaliatory action here unlawful. Rather, the Florida legislature only made it "an unlawful employment practice . . . to discriminate against any person because . . . that person has made a charge" under the Act. § 760.10(7), Fla. Stat.; see also § 760.11 (providing administrative and civil remedies for unlawful practices under the FCRA). Thus, the legislature has only modified the employment at will doctrine to the extent of making it unlawful to retaliate against a person for that person's own act of pursuing a discrimination claim. As shown on the face of Mr. Donato's Complaint, no such retaliation is alleged here. Plaintiff alleges that only Mrs. Donato made a discrimination claim under the Act. Because only those who make discrimination claims may sue for unlawful retaliation, Mr. Donato plainly has no claim under Florida's retaliation statute.

Because his retaliation claim is not legally cognizable under common law or the statutory scheme prohibiting retaliation against persons making discrimination claims, plaintiff attempts to do indirectly what the legislature did not allow him to do directly: he argues that AT&T's retaliation constituted unlawful discrimination based on his marital status. As we now show, AT&T's alleged action did not constitute action directed at plaintiff's marital status and is therefore not marital status discrimination as a matter of law. The question certified by the Eleventh Circuit, as well as the question restated by plaintiff, should accordingly be answered in the negative.

I. THE ACT'S PROHIBITION AGAINST MARITAL STATUS DISCRIMINATION ONLY PROHIBITS DISCRIMINATION BASED SPECIFICALLY ON A PERSON'S STATUS AS MARRIED, DIVORCED, SEPARATED, WIDOWED OR UNMARRIED.

Section 760.10, Florida Statutes, prohibits discrimination by employers on the basis of marital status and thereby modifies in part the common law employment at will doctrine. In pertinent part, the statute reads:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

Fla. Stat. § 760.10(1)(a) (1993).

Plaintiff's argument in this case rests on his contention that the term "marital status" encompasses not just an individual's position with respect to marriage but also the boundless body of information concerning the acts and attributes of those persons with whom that individual shares a marital status. He contends that where an employer's action is based on the acts of an employee's spouse, the employer's action is based on the employee's marital status. The term marital status, however, cannot be distorted to be so far-reaching. It is, instead, simply an individual's legal status or position with respect to marriage.

The plain meaning of a statute is the polestar of statutory interpretation. Acosta v. Richter, 671 So. 2d 149, 153 (Fla. 1996). Hence, words used in a statute must be given their common, ordinary meaning, Citizens of State v. Public Serv. Comm'n, 425 So. 2d 534, 541-42 (Fla. 1982), and where that meaning is plain and unambiguous, it must be applied. Dade County v. Pena,

664 So. 2d 959 (Fla. 1995). It is not the province of the courts to re-write acts of the legislature, State v. City of Fort Pierce, 88 So. 2d 135, 136 (Fla. 1956), even if a change would better serve the statute's underlying philosophy. State v. Barnes, 595 So. 2d 22, 24 (Fla. 1992). Where the language chosen by the legislature has a definite and precise meaning, courts cannot restrict or extend that meaning; nor can they modify clearly expressed legislative language in order to further policies they favor. Graham v. State, 472 So. 2d 464, 465 (Fla. 1985); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). Courts are in fact prohibited by the constitution from adding anything to a statute that is not stated in or implied by its language. In re Hewitt's Estate, 153 Fla. 137, 13 So. 2d 904, 906 (Fla. 1943).

The Florida legislature did not define "marital status" when it outlawed discrimination on this basis by Florida employers. See Fla. Stat. § 13.261(1)(a) (1977) (currently codified at Fla. Stat. § 760.10(1)(a)). Nonetheless, the meaning of this term can be easily ascertained by reference to a dictionary. L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997) ("a court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to [a] term"); Green v. State, 604 So. 2d 471, 473 (Fla. 1992) (same). Status means "[s]tanding; state or condition; social position," and marital means "[r]elating to, or connected with, the status of marriage." Black's Law Dictionary, at 967, 1410 (6th ed. 1990). More contemporaneous with the 1977 enactment, a popular 1970 dictionary similarly defined status as "the condition of the person or a thing in the eyes of the law" and defined marital is defined as "of or relating to the married state." Webster's Seventh New Collegiate Dictionary, at 517, 856 (1970).

By the term's plain and ordinary meaning, therefore, one's marital status is one's condition or position with respect to marriage. The broadest realm of positions one could possibly occupy would be married, divorced, separated, widowed, or unmarried. Accordingly, the term's plain and ordinary meaning denotes whether a person is married, divorced, separated, widowed or unmarried.

That the Florida legislature chose not to define the term "marital status" is not surprising. That term is and has been regularly used in a multitude of everyday contexts in precisely the same manner in which it is defined by the dictionary. For instance, many state and federal tax forms request an individual's marital status, and the appropriate responses are married, single or the like. Furthermore, the standard State of Florida juror voir dire questionnaire in use since 1968 has requested prospective jurors to fill in the following blank: "Marital status: (married, single, divorced, widow or widower) _____." In re Fla. Rules of Civ. Proc., 253 So. 2d 404, 417 (Fla. 1971) (published as Form 1.984, Fla. R. Civ. P.).

Equally telling as to what marital status does and does not mean is the Fact Information Sheet currently used in Florida's Small Claims courts. That form, which was approved for use by this Court, requests in part the following information:

> Marital Status: _____ Spouse's Name _____
> Spouse's Address (if different): _____
> _____ _____/_____
> Spouse's Social Security Number: _____ Birthdate: _____
> Spouse's Employer: _____

In re Amendments to the Fla. Small Claims Rules, 682 So. 2d 1075, 1080 (Fla. 1996) (published as Form 7.343, Fla. Sm. Cl. R.). This form clearly contemplates that marital status is precisely that -- an individual's status.

Importantly, this definition does not, as plaintiff contends, also encompass the acts or attributes of persons to whom one is married, divorced, separated, widowed or not married. Instead, obtaining personal information about a spouse calls for an entirely separate inquiry -- exactly as the Small Claims Form provides. The New York Court of Appeals emphasized this very point when it stated:

> [W]hen one is queried about one's "marital status", the usual and complete answer would be expected to be a choice among "married", "single", etc., but would not be expected to include an identification of one's present or former spouse and certainly not the spouse's occupation.

Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 415 N.E.2d 950, 953 (N.Y. 1980).

The correctness of this plain and ordinary construction may also be seen throughout Florida's case law, where the term marital status has been used exactly in this sense in over 100 cases throughout this century. Reference to even a few of those cases well illustrates the point: Gammon v. Cobb, 335 So. 2d 261, 267-68 (Fla. 1976) (illegitimate child has right to support from father regardless of mother's "marital status"); Lucian v. Southern Ohio Sav. Bank & Trust Co., 156 Fla. 370, 23 So. 2d 674, 676 (Fla. 1945) (action for divorce is in rem, the "marital status" being the res); In re Estates of Salathe, 703 So. 2d 1167, 1169 (Fla. 2d DCA 1997) ("marital status" of couple, *i.e.* the validity of their marriage, to be determined by German law); Givens v. State, 619 So. 2d 500, 502 (Fla. 1st DCA 1993) (characterizing challenge to unmarried juror as

based on "marital status"); Parham v. Kohler, 134 So. 2d 274 (Fla. 3d DCA 1961) (unmarried plaintiffs in negligence action perjured themselves regarding their "marital status"); Colby v. Colby, 120 So. 2d 797, 799 (Fla. 2d DCA 1960) (plaintiff sought declaration of "marital status"). The United States Supreme Court has likewise made use of the plain meaning of this term. Califano v. Jobst, 434 U.S. 47, 53-54 (1977) (holding that it was rational for Congress to assume that a child's "marital status" can be indicative of whether the child is dependent on others).

By the same token, the Florida legislature has utilized the term "marital status" in nearly 40 other statutes, including over 25 that specifically prohibit marital status discrimination in areas as diverse as housing, health insurance, and public employees' retirement plans. See, e.g., Fla. Stat. § 112.66(10) (public employee retirement plans), § 175.333 (firefighters' pensions), § 420.516 (multi-family housing), § 497.445(7) (funeral services), § 626.9541 (1)(o)8 (auto insurance premiums), § 634.336(7) (warranty contracts), § 636.022 (group health services) (1995). These statutes are all in pari materia with the Florida Civil Rights Act, and all of them are clearly directed at the issue of whether an individual is married, divorced, separated, widowed or unmarried.

Significantly, there is no legislative history suggesting that the legislature intended to depart from the plain, ordinary meaning of the term marital status. Quite to the contrary, the only commentator to speak to the Act's marital discrimination prohibition has suggested that the impetus for the legislature's use of that phrase was a decision by the former Fifth Circuit in which an airline's policy of hiring only unmarried female flight attendants did not qualify

as sex discrimination under Title VII of the 1964 Civil Rights Act.[2/] John-Edward Alley, Marital Status Discrimination: An Amorphous Prohibition, 54 Fla. B.J. 217, 218 (1980) (citing Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir.), cert. denied, 404 U.S. 991 (1971)).

Stroud demonstrates the exact sort of discrimination the legislature prohibited when it added marital status to the Act. The institution of marriage holds a special status in society. See Light v. Meginniss, 156 Fla. 61, 22 So. 2d 455, 456 (Fla. 1945) (marriage is of "vital public interest"). Yet employers such as Delta Air Lines were denying married women jobs. Single women, on the other hand, were being denied credit, such as home mortgage loans, precisely because they were not married. Discrimination on the basis of one's marital status was both pervasive and lawful, and the legislature enacted the marital status discrimination provision to eliminate that socially undesirable conduct.

If the term marital status were to require construction, which it does not, these social conditions would be identified by the Court as the evils the legislature sought to remedy when it prohibited marital status discrimination. See, e.g., Ideal Farms Drainage Dist. v. Certain Lands, 154 Fla. 554, 19 So. 2d 234, 239 (1944) (holding that, to ascertain the legislative intent in adopting a statute, courts are required to examine both the circumstances intended to be affected and the mischief intended to be remedied). There is no evidence whatsoever -- either within or without the statute itself -- that the legislature intended the marital status discrimination prohibition to encompass situations,

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[2/] Title VII of the 1964 Civil Rights Act does not include marital status as among the prohibited bases for discrimination. See 42 U.S.C. § 2000e, et seq.

as in this case, where action is allegedly taken against an employee based on the acts or attributes of a third person with whom the employee shares a relationship.

In sum, marital status plainly and unambiguously means the position a person holds with respect to marriage -- the person is married, divorced, separated, widowed or single. Under this Court's long-standing precedent, that common and natural meaning controls and should be applied when determining whether an employment decision constitutes unlawful discrimination based on marital status.

Although this is a question of first impression for this Court, numerous other courts have applied the plain meaning of the term marital status to hold that, unless the alleged action is taken solely because of the person's status as married, divorced, separated, widowed or unmarried, it does not constitute marital status discrimination. E.g., Muller v. BP Exploration (Alaska), Inc., 923 P.2d 783, 788-92 (Alaska 1996); Blackwell v. Danbury Hosp., No. 321561, 1996 WL 409370, at *3 (Conn. Super. June 26, 1996); Boaden v. Department of Law Enforcement, 664 N.E.2d 61, 64-66 (Ill. 1996); Maryland Comm'n on Human Relations v. Greenbelt Homes, 475 A.2d 1192, 1196-97 (Md. 1984); Whirlpool Corp. v. Michigan Civil Rights Comm'n, 390 N.W.2d 625, 626-28 (Mich. 1986); Thomson v. Sanborn's Motor Express, Inc., 382 A.2d 53, 56 (N.J. Super. Ct. App. Div. 1977); Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 415 N.E.2d 950, 953-54 (N.Y. 1980); Townshend v. Board of Educ., 396 S.E.2d 185, 189 (W. Va. 1990); County of Dane v. Norman, 497 N.W.2d 714, 715-16 (Wis. 1993).

Many of these cases concerned anti-nepotism or no-spouse policies by which employers would not employ persons married to each other. The analysis in Whirlpool is illustrative of the courts' reasoning in these cases:

> [T]his is not discrimination on the basis of marital status. It is different treatment based on the fact that one's spouse works in the same place as the applicant. Marital status is irrelevant to the employer unless there is a spouse already working for the employer. This is not discrimination based on a stereotypical view of the characteristics of married or single persons.

390 N.W.2d at 627. Similarly, the New York Court of Appeals held that if the legislature had desired "to prohibit discrimination based on an individual's marital relationships--rather than simply on an individual's marital status--surely it would have said so." Manhattan Pizza Hut, 415 N.E.2d at 953 (emphasis in original). The Florida legislature did not say so.

Moreover, it is telling that the various bases for unlawful discrimination that were enumerated by the legislature in the Act all refer to objectively identifiable traits or characteristics. These include, in addition to marital status, characteristics such as age, race, color, sex and handicap. With respect to these prohibited bases for discrimination, the Act has been given its plain meaning. For instance, in Morrow v. Duval County School Board, 514 So. 2d 1086 (Fla. 1987), this Court addressed the Act's age discrimination prohibition. After stating that the Act was intended to prohibit arbitrary discrimination in employment, the Court specifically held that the Act prohibits discrimination "based solely on age." Id. at 1087-88. Similarly, the district courts of appeal have consistently held that a prima facie case of handicap discrimination is only made where an employee demonstrates that he or she was denied a job "solely" because of a handicap. Davidson v. Iona-McGregor Fire Protection

and Rescue Dist., 674 So. 2d 858, 860 (Fla. 2d DCA 1996); Brand v. Florida Power Corp., 633 So. 2d 504, 510 (Fla. 1st DCA 1994).

Under its controlling precedent, this Court should give the marital status discrimination prohibition its plain and commonly understood meaning and hold that an employer discriminates on the basis of marital status where action is taken against the employee specifically because of the employee's legal status as one who is married, divorced, separated, widowed or unmarried. That is the sort of invidious, arbitrary conduct -- based on stereotypical views of persons of a given marital status -- the legislature intended to prohibit through the Act.

Here, plaintiff does not claim he was fired because his marital status was "married." He contends he was fired in retaliation for the actions of his wife. Under the plain meaning of marital status, that is not discrimination based on marital status, and the certified question should be answered in the negative.

II. EVEN UNDER THE "BROAD" VIEW PLAINTIFF URGES, MARITAL STATUS DISCRIMINATION MUST BE CONDUCT DIRECTED AT LEAST IN PART AT A PERSON'S MARITAL STATUS.

Notwithstanding the plain and commonly accepted meaning of marital status, a small minority of courts have embraced a so-called "broad" view of marital status discrimination, holding that it encompasses discrimination based in part on marital status and in part on some other factor. These courts reject the majority, "narrow" view that marital status discrimination only exists where the action is directed solely at the legal status of marriage.

Plaintiff argues that the Florida Commission has followed the minority, broad view and that his claim comes within the Act under this view. However, as a host of authorities from this and other states show, even the broad view of

marital status discrimination requires that the allegedly wrongful act must be directed at least in part at a person's status as married, divorced, separated, widowed or unmarried and thus directed specifically at the institution of marriage -- even if this combines with another factor to lead to termination. Plaintiff's claim that he was fired in retaliation for his wife's law suit fails to satisfy this condition. Thus, even if this Court were to accept the minority view, which we submit it should not, plaintiff's retaliation claim is not within that view and is not cognizable as marital status discrimination. The Eleventh Circuit's question in all events should be answered in the negative.

A. THE BROAD VIEW OF MARITAL STATUS DISCRIMINATION.

As just noted, some courts have held that marital status discrimination may be found where the employer's action is based on marital status combined with some other factor -- a sort of "marital status plus" theory. See, e.g., Ross v. Stouffer Hotel Co. (Hawaii) Ltd., 816 P.2d 302, 303-04 (Haw. 1991); Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979); Thompson v. Bd. of Trustees, 627 P.2d 1229, 1231-32 (Mont. 1981). The Minnesota Supreme Court's decision in Kraft is particularly important, since the Commission in Florida adopted both Kraft's reasoning and its view of marital status discrimination.

In Kraft, the Minnesota court explained that prohibiting marital status discrimination protects both the fundamental right of individuals to chose whether to marry and the institution of marriage itself. 284 N.W.2d at 388. The Court acknowledged that the anti-nepotism policy at issue there took into consideration what company employed an employee's spouse, but the court found that the policy was triggered only when co-workers actually married and

that this infringed on the employees' rights to chose what marital status they should hold. Accordingly, the court announced that it would follow a broad view of marital status discrimination and that this view may "embrace the identity or situation of one's spouse." 284 N.W.2d at 388. To hold otherwise, the court stated, "would condone discrimination against a portion of a protected class, i.e. job applicants already married to full-time Kraft employees." Id.

Importantly, the Kraft court did not hold that discriminating on the basis of a spouse's identity alone, without focusing on the marital status of the employee -- the situation before the Court in this case -- would constitute marital status discrimination. That issue was subsequently presented and expressly decided in Cybyske v. Independent School District No. 196, 347 N.W.2d 256 (Minn. 1984), a case that is on all fours with the current case and that was later followed under similar circumstances by Florida's Fifth District Court of Appeal. See pages 23-26, infra.

In Cybyske, an applicant filed a marital status discrimination claim against a school board after her application for a teaching position was denied. Much as plaintiff here argues he was fired because he was married to a woman who filed a law suit against AT&T, Cybyske claimed that "the reason she was not hired was because she was married to Daniel Cybyske, and that the school district did not like her husband's 'pro-teacher' views." Id. at 258-59. She specifically argued that the "broad" view of marital status discrimination adopted in Kraft encompassed the identity of her spouse and that, under Kraft, she was entitled to relief.

The Minnesota Supreme Court disagreed. The court began by recognizing the distinction between the "narrow" and "broad" views of marital

status discrimination and reaffirming its acceptance of the broad view. As the court explained, however, under the anti-nepotism policy at issue in Kraft, the employer's action was "a direct attack" on the marital status of the co-workers. Id. at 261. In contrast, the rejection of Cybyske's application because of her husband's political views was not directed at "the institution of marriage" itself but rather at particular individuals. Accordingly, the school board's action did not constitute marital status discrimination. Id.

As Cybyske confirms, even the broad view of marital status discrimination does not prohibit action against an employee that is prompted merely by the acts or attributes of the person with whom the employee shares a marital relationship. To the contrary, the discrimination must be specifically directed, at least in part, at the legal status of the individual as either a married, divorced, separated, widowed or unmarried person. Simply put, marital status discrimination under the broad view occurs only where the employer focuses directly on the employee's marital status alone or it focuses directly on (i) the employee's marital status plus (ii) some other factor, such as a spouse's occupation. Only under those conditions can the employer's action be said to be directed at the marital status, rather than the marital relationship, and thus constitute marital status discrimination.

The subsequent decision in State ex rel. Johnson v. Floyd Wild, Inc., 384 N.W.2d 185 (Minn. Ct. App. 1986), provided a careful and considered analysis under the broad view. There, a woman was employed by a closely held corporation that was controlled by her husband's family. When her marriage failed and she refused to attend counseling, her employment was terminated. She sued for marital status discrimination, charging that she was fired because

of her separation and pending divorce from her husband. She lost. The Minnesota appellate court held that, because the termination was the result of her leaving the family, as opposed to her change in marital status, the employer did not discriminate on the basis of her marital status. Id. at 188. In the language of Cybyske, the employer's action was not directed at her legal status as a separated or divorced woman; instead, it was directed at her failed relationship with her husband. Had all of the exact same facts existed but her status remained legally "married," the employer still would have taken the same action.

In sum, even under the "broad" view a few courts have adopted, marital status discrimination can be found only when the action is directed at the marital status combined with some other factor, such as when an unwed pregnant woman is fired because she is both pregnant and unmarried, and a pregnant married woman would not be fired. The unlawful act remains the improper focus on a person's marital status -- unmarried -- as the basis for discriminating against him or her. But absent an act directed at least in part at the marital status itself, there can be no marital status discrimination.

B. THE COMMISSION ADOPTED MINNESOTA'S BROAD VIEW IN OWENS.

In Owens v. Upper Pinellas Association for Retarded Citizens, 8 Fla. Admin. L. Rep. 438 (F.C.H.R. 1985), the Commission on Human Relations was confronted with a situation where an employee was terminated pursuant to an employer's anti-nepotism policy when he married a co-worker. The Commission's decision quotes extensively from the Minnesota Supreme Court's decision in Kraft, wherein the Minnesota court explained that prohibiting marital status discrimination protects both the fundamental right of

individuals to chose whether to marry and the institution of marriage itself. Id. at 441. Finding the anti-nepotism policy triggered when co-workers marry and that the employer otherwise employed married, single and divorced people, the Minnesota court concluded that marital status discrimination can be based in part on the identity or situation of one's spouse and held that the challenged anti-nepotism policy was unlawful marital status discrimination.

The Commission expressly adopted the Kraft court's reasoning and reached the same conclusion in the context of the anti-nepotism policy challenged in Owens. Id. As the Commission put it:

> We interpret the term "marital status" broadly to include one's relationship to one's spouse, rather than narrowly to include only the fact that one is married, single, divorced or widowed.

Id. at 440 (footnote omitted).[3/] Stating that this definition was "consistent" with the Act's liberal construction clause, the Commission in Owens concluded that marital status discrimination may be found where marital status is not the only factor motivating the employer's challenged action and the marital relationship is included as well.

Owens was terminated precisely because he held a particular marital status -- he was not terminated until he married. Although an additional factor giving rise to Owens' termination was the identity and occupation of his spouse -- a co-worker -- the fact that Owens held the legal status of "married" was an indispensable prerequisite to application of the employer's anti-nepotism policy. Without considering the person to whom Owens was married, the very fact he was married was critical to the employer's decision. He would not have

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[3/] The Commission later codified this holding by adopting a rule that defines "marital status" in this same way. Fla. Admin. Code R.60Y-3.001(17).

been terminated had been anything other than legally married to his co-worker. In the parlance of Minnesota's "broad" view, the discrimination was directed at the institution of marriage itself -- once co-workers married, both of them could not stay with the company -- and hence the employer's policy was held to be unlawful. Importantly, the Commission did not rule in Owens that marital status need not be a factor at all; nor did it suggest that marital status discrimination occurs where the employer focuses only on one's relationship with one's spouse. The distinction between what the Commission actually held and what plaintiff suggests it held is fatal to plaintiff's argument.

C. PLAINTIFF'S CONTENTION THAT HIS CLAIM IS WITHIN THE BROAD VIEW IS CONTRARY TO THE ONLY FLORIDA DECISION ON POINT AS WELL AS A SERIES OF DECISIONS FROM THE COMMISSION.

Asserting that his claim comes within the broad view of marital status discrimination, plaintiff implicitly suggests that this is the first case in Florida to present the issue of whether marital status discrimination under the Act may be found where an employee is fired because of his spouse's actions. To the contrary, many former Florida employees have raised this issue, and all of them lost their claims precisely because -- even under the broad view -- Florida law does not recognize marital status discrimination where the challenged action was not predicated in some part on the employee's legal status as a married, divorced, separated, widowed or unmarried person. The claims presented in those cases are identical in all material respects to plaintiff's claim, and the result in each of them demonstrates why the question certified by the Eleventh Circuit must be answered in the negative. Indeed, to hold in plaintiff's favor would require this Court to overrule all of these authorities.

The first case to address this situation was Selvaggio v. Knight-Ridder Publishing Co., 3 F.A.L.R. 2379-A (F.C.H.R. 1981), where an employee claimed to be the victim of mistreatment by her employer because of who she chose to marry. The officer who heard the case rejected Selvaggio's marital status discrimination claim as insufficient under the Act. The hearing officer specifically concluded that the Act does not create "a cause of action for discriminatory treatment based on one's marital partner; [but] rather the statutory language is clear that discriminatory treatment is actionable only if it is based upon marital status." 3 F.A.L.R. at 2385-A (emphasis in original). The Commission specifically adopted all of the hearing officer's conclusions and affirmed the dismissal of Selvaggio's claim for marital status discrimination. Id. at 2380-A.

The Commission in Owens later characterized this language to be partially dicta, insofar as Selvaggio appeared to adopt the narrow, rather than the broad, view of marital status discrimination. Owens, 8 F.A.L.R. at 442. At the same time, however, the Commission in Owens made clear that it was not receding from its holding in Selvaggio, stating: "The employee in that case failed to establish by a preponderance of the evidence that the employer had discriminated against her on the basis of marital status under either the narrow or liberal interpretation of the term." Id. Thus, Selvaggio continues to stand for the proposition that taking action merely because of some act or characteristic of the person to whom a person is married does not constitute marital status discrimination.

The next case to present the claim plaintiff brings here was Morand v. National Industries, Inc., 9 F.A.L.R. 5978 (F.C.H.R. 1987). Sharon and Robert

Morand were each employed by National Industries. Robert quit after allegations were made that his behavior was inappropriate. National Industries subsequently terminated Sharon on the basis that her presence increased the likelihood that Robert would return to the company's premises. She complained to the Commission that she was fired based on her relationship to her husband and the employer admitted as much. Nonetheless, a hearing officer rejected her marital status discrimination claim, concluding:

> It was not the Petitioner's status as married or unmarried that motivated her termination. National believed that the presence of Sharon Morand, married or unmarried, increased the likelihood of the presence of Robert Morand. Consequently, under the most liberal interpretation of "marital status" Petitioner failed to establish a prima facie case of discrimination within the meaning of Section 760.10(1)(a) Florida Statutes.

9 F.A.L.R. at 5992-93.

In short, the hearing officer concluded that there was no "marital status" discrimination because the employer's action was not directed at Morand's status as a member of the class of married persons. Rather, the action was based on aspects of Morand's personal relationship with Robert Morand which were entirely unrelated to the fact of her legal status as a married woman.

Notwithstanding its earlier holding in Selvaggio, the Commission rejected the hearing officer's recommendation to dismiss Sharon Morand's petition. Pointing to the broad view announced in Owens, the Commission seized on the employer's concession that Sharon Morand was fired because of her "relationship" with her husband. The Commission then held:

> Respondent admitted that although she was a satisfactory employee, Petitioner was terminated due to her relationship with Robert Morand. It is the fact that their relationship was a marital one and, as such

> protected under the Florida Human Rights Act of 1977, as amended, that Respondent's action must be found violative of Florida's anti-discrimination law.

Id. at 5981. Under this holding, marital status discrimination exists where an employer fires an employee based on any aspect of the employee's relationship with a third person, if that third person happens to be the employee's spouse or divorced spouse.

The employer's appeal resulted in a resounding reversal of the Commission. The district court held the Commission's interpretation of marital status to be clearly erroneous as a matter of law. National Industries, Inc. v. Commission on Human Relations, 527 So. 2d 894 (Fla. 5th DCA 1988). After acknowledging the Commission's decision in Owens to follow a "broad" view of marital status discrimination, the National Industries court held:

> Discharge based on an anti-nepotism policy is clearly distinguishable from what occurred in the instant case. Here, Sharon Morand's termination did not occur because of her marital status; it occurred because of National's desire to keep Robert Morand off the premises. The Commission's interpretation of the statute is erroneous and, thus, must be reversed. See § 120.68(9), Fla.Stat. (1985).

Id. at 897.

Distinguishing Morand's claim from the one upheld on Owens and recognizing that the broad view adopted in Owens was borrowed directly from the Minnesota Supreme Court's decision in Kraft, the court concluded that Sharon Morand's claim was "factually similar" to Cybyske, where the Minnesota Supreme Court held that the rejection of a woman's job application based on her husband's political views, rather than because she was married, was not marital status discrimination. 527 So. 2d at 897 n.1. The court held that, just as the Minnesota court determined in Cybyske, "even a broad

interpretation of 'marital status'" did not encompass Morand's termination based on "her relationship with Robert Morand" and his disruptive conduct at her place of work by virtue of that "relationship." Sharon Morand was terminated because of that "relationship," not because of the fact she was married. Id. By holding that the termination nonetheless constituted "marital status" discrimination, the Commission had impermissibly "re-written a clear statute." Id. at 898.

The decision in National Industries made it clear that, even when given the "broad" view, the Act does not prohibit discrimination based merely on marital relationships. Rather, to discriminate against someone on the basis of marital status, the reason for the employer's action must be directed at least in part at the person's legal status with respect to the institution of marriage, not at some act or attribute of a person with whom the employee shares that status. The legal status with respect to marriage must itself be a basis, though not necessarily the only basis, for the discriminatory action. In sum, marital status discrimination has occurred if, but for **the legal status** held by the person -- i.e., the person's status as married, divorced, separated, widowed or unmarried -- the employer would not have taken the allegedly discriminatory action.

As the National Industries court implicitly recognized by its discussion of Owens, the Commission's holding in Owens satisfied that test. Owens was terminated as a direct result of the fact he was married, combined with the additional fact that his spouse was a co-worker. The employer's anti-nepotism policy targeted a specific subclass of married people and, as such, was directed against the institution of marriage. But for Owens' marital status -- his legal status as a married person -- he would not have been fired.

On the other hand, the Commission's decision in Morand did not satisfy that test. Robert Morand caused disturbances when he visited Sharon Morand at work. Sharon was fired because of her spouse's conduct. The point is, of course, that the employer's action was not targeted at a class or even a subclass of people who were married, single, divorced, widowed, separated, or the like. Thus, it could not be said that the action was directed at the institution of marriage, as required under the Kraft analysis adopted by the Commission in Owens. Rather, the employer's action was targeted at the Morands personally, not at the specific "marital status" of Sharon Morand. Unlike an anti-nepotism policy, there was no requirement that Sharon Morand be married in order for her to have been fired; she could have been unmarried and still been fired because Robert was disruptive when he came to visit her at work. Accordingly, the Fifth District correctly held her termination was not the result of discrimination based on her marital status.

In a weak effort to avoid this decision, plaintiff argues that the court's opinion did not discuss the rules of statutory construction. However, a court need not discuss all of its reasoning in an opinion. Moreover, there was no need to expound on the rules of statutory construction, since the court correctly applied the Act's language in accordance with its plain meaning. See Dade County v. Pena, 664 So. 2d 959, 960 (Fla. 1995) ("courts should not depart from the plain and unambiguous language of the statute"). As the court recognized, the statute plainly does not prohibit discrimination based on the acts or attributes of the employee's spouse or some aspect of the marital relationship -- it prohibits discrimination based on the employee's marital status. 527 So. 2d at 898. As such, the Commission had impermissibly "re-

written a clear statute" when it concluded that the employer's termination of Mrs. Morand based upon her "relationship" with her husband constituted marital status discrimination.

Since National Industries reversed the decision in Morand, the Commission has repeatedly held that claims such as plaintiff's -- where an employee was terminated because of the actions of a spouse -- are not within the broad view and do not constitute marital status discrimination under the Act. Ironically, while plaintiff cites these cases to show that the Commission still follows the broad view, these decisions conclusively demonstrate that firing plaintiff because of his wife's law suit would not constitute marital status discrimination under the Act.

In Brown v. Viking Fire Protection, Inc., 15 F.A.L.R. 1625 (F.C.H.R. 1992), Sharon Brown charged her former employer with marital status discrimination, claiming that her husband was fired by the company and that she was then fired based on her relationship with him. The Commission accepted Brown's contention that one of the reasons she was fired was her relationship with her husband, but it determined that there was no evidence that Brown was fired because of her marital status. Specifically citing National Industries, the hearing officer concluded:

> Petitioner was not terminated because she was married but because of her involvement with Sam Brown. Petitioner's termination was not related to the fact that she was married per se, but solely by reason of the person to whom she was married. This does not constitute discrimination by reason of marital status.

15 F.A.L.R. at 1633. Though the Commission expressly reaffirmed its commitment to the broad view and its rule defining marital status discrimination, it adopted these conclusions and accordingly dismissed Sharon

Brown's petition. Id. at 1628. By comparison, the Commission decided in Potasek v. Florida State University, 18 F.A.L.R. 1952 (F.C.H.R. 1995), that a "prima facie" case for marital status discrimination had been made precisely because the petitioner complained that her status as a married woman, rather than some act or attribute of her husband, prevented her from obtaining a job at Florida State University.

The most recent decision by the Commission to address this issue is Smith v. Food Lion, Inc., 17 F.A.L.R. 3040 (F.C.H.R. 1994), a case that further demonstrates the Commission's rejection of plaintiff's strained view of marital status discrimination. In Smith, a Food Lion manager was fired after he failed to take appropriate action in response to his estranged wife's acts of cashing bad checks at Food Lion stores. The manager claimed that he was fired based on his marital status and his wife's misconduct. The hearing officer concluded, however, that the manager "was not discharged because he was married." Id. at 3047. The hearing officer explained:

> The courts have held that an employer's termination of an employee because of a spouse's actions is not actionable discrimination based on marital status.

Id. (citing National Industries). The hearing officer noted that Smith's discharge appeared unfair, but he concluded that "the law does not protect against unfair business decisions -- only against decisions motivated by unlawful discrimination." Still following the broad view and its rule defining marital status discrimination, the Commission adopted these conclusions and dismissed Smith's petition. Id. at 3042.[4/]

[4/] Plaintiff also cites a recent "determination of cause" issued by the Commission's director in Nocera v. dme Corp., F.C.H.R. No. 95-J872 (Oct. 14, 1997), wherein the director (continued...)

The Commission's decisions in Selvaggio, Brown, and Smith, as well as the District Court's decision in National Industries, are completely and entirely applicable to the question presented to this Court here, and the result in each of those cases should be the result here. Like those petitioners, plaintiff bases his marital status discrimination claim on an assertion that he was fired in retaliation for the actions of his spouse. Unlike situations involving enforcement of anti-nepotism policies, AT&T is alleged to have cared not that plaintiff was married but only that the person to whom plaintiff was married had sued it. Under the above-cited decisions, AT&T's action was not unlawful marital status discrimination because it was not a decision directed at the institution of marriage by focusing on an individual's status as one who is married, divorced, separated, widowed or unmarried. As the Commission explained in Smith, regardless of whether AT&T's alleged action may appear "unfair," it was nonetheless not unlawful because it was not discrimination based on plaintiff's marital status.

By his "restated" question and by his position before this Court, plaintiff seeks to have this Court "re-writ[e] a clear statute" and overrule these soundly reasoned and clearly stated decisions, authorities that plainly reject plaintiff's argument that a termination based on his wife's acts constitutes marital status

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[4/](...continued)
found "probable cause" of marital status discrimination when an employer allegedly fired an employee after it terminated her spouse. Because of the limited facts provided in the determination, it is not possible to determine the factual nature of the employee's claim. Moreover, the director's determination nowhere cites to any of the previously discussed cases, and it certainly cannot be deemed to be an abandonment or rejection of National Industries or the Commission's actual decisions in Selvaggio, Brown and Smith. Indeed, rather than constituting a decision on the case by the Commission, the determination is merely one person's authorization for the employee to proceed to an administrative hearing or to file suit. § 760.11(4), Fla. Stat. It should not be construed to be persuasive authority, such as an actual decision by the Commission would be.

discrimination. This Court should decline that invitation. The above-cited decisions are completely consistent with the plain language and clear meaning of the Act, which prohibits discrimination based not on a marital relationship but on one's marital status.

III. THE LEGISLATURE'S 1992 AMENDMENT TO THE ACT WAS A LIMITATION, NOT AN EXPANSION OF WHAT CONSTITUTES MARITAL STATUS DISCRIMINATION.

Plaintiff relies on a 1992 amendment to section 760.10 to argue that his claim falls within the broad view of marital status discrimination. The amendment provided that it is not unlawful for an employer to:

> [t]ake or fail to take any action on the basis of marital status if that status is prohibited under its anti-nepotism policy.

1992 Fla. Laws Ch. 92-282, § 2, at 2121 (codified at Fla. Stat. § 760.10(8)(d)).[5/] The effect of the amendment is simply that anti-nepotism policies are now exceptions to the prohibition of marital status discrimination in employment law. That amendment has no effect whatsoever on this case.

[5/] The legislative history to this amendment establishes that the legislature's specific purpose was to overrule the holding in Owens:

> The Commission on Human Relations has held that an employer's anti-nepotism employment policy which forbade [sic] related persons from working there and which resulted in the discharge of one of two employees when those employees married constitutes a discriminatory practice based on marital status absent a compelling and overriding bona fide occupational qualification. Robert Owens v. Upper Pinellas Assoc. for Retarded Citizens, 8 F.A.L.R. 438 (Florida Commission on Human Relations 1985). The decision was affirmed without opinion by the Second District Court of Appeal. 495 So.2d 754 (Fla. 2d DCA 1986). The effect of the amendment would be to reverse the Commission's ruling.

SB 18H, Senate Staff Analysis and Economic Impact Statement, at 4 (Fla. May 27, 1992).

Plaintiff improperly attempts to turn the legislature's restriction on the scope of marital status discrimination into an expansion of the prohibition. He contends that the only exceptions to marital status discrimination in employment law are the anti-nepotism amendment and subsection 760.10(8)(a)'s exception for "bona fide occupational qualification[s]." From this, plaintiff argues that if Florida's legislature had intended to exclude "all discrimination based on the relationship of an employee to a particular person," it would have abolished the "broad" view and defined marital status as "the general state of marriage or non-marriage." (In. Br. 21-22). Since the legislature did not do so, plaintiff argues his claim is encompassed within Florida's prohibition of marital status discrimination. Two flaws doom plaintiff's contention.

First, plaintiff's contention assumes the answer to the question. His contention is based on the unwarranted premise that the broad view of the Act adopted by the Commission in Owens encompasses his claim that he was fired in retaliation for his wife's law suit and that the Act would accordingly have to be amended to provide otherwise. However, as we have shown above and as the court held in National Industries, plaintiff's premise is incorrect -- the broad view does not encompass a claim such as plaintiff's. Therefore, there was no need for the legislature to amend the Act in the manner plaintiff asserts. Indeed, the legislature is presumed to have been aware of the National Industries decision when this amendment was enacted some four years later, Nicoll v. Baker, 668 So. 2d 989, 991 (Fla. 1996), and, unlike its action to overturn Owens, the legislature did not take any action to overturn National

Industries. The amendment certainly does not expand the scope of marital status discrimination beyond the view expressed there.

The second flaw in plaintiff's analysis is the suggestion that his claim is the sort of claim the legislature sought to preserve by merely excepting anti-nepotism policies rather than redefining marital status as the general state of marriage or non-marriage. To the contrary, there remain countless actions that may constitute marital status discrimination under the broad view, despite the existence of the anti-nepotism amendment. For example, an employer may have a policy of firing (or not hiring) any single woman who is pregnant. Enforcement of that policy would constitute marital status discrimination under the broad view, since the action would be directed specifically at the employee's status as a single person, combined with the fact of her pregnancy. In the same vein, an employer could have a policy of refusing to employ spouses of competitors (such as lawyers whose spouses work for competing law firms). Such a policy would have no relation to nepotism, since the employees affected by the policy would work for different companies. Its enforcement, however, would amount to marital status discrimination because the policy would be triggered directly by the prospective employee's marriage, combined with the fact that the spouse is employed by a competitor.

As can readily be seen, plaintiff's reliance on the anti-nepotism amendment is misplaced. It was enacted purely and simply to overrule the holding in Owens regarding anti-nepotism policies. It did not overrule the holding in National Industries and it did not expand the scope of marital status discrimination as plaintiff contends. Consequently, it has no effect on this case.

IV. PLAINTIFF ADVOCATES A CLAIM UNAUTHORIZED BY THE FLORIDA LEGISLATURE AND THIS COURT'S PRECEDENT.

Perhaps recognizing that both Florida law and the plain language of the Act are contrary to the position he advocates here, plaintiff's last effort to persuade this Court to accept his interpretation of marital status discrimination is grounded in the "public policy" of the Act's liberal construction clause. Plaintiff maintains that, for "policy" reasons, his retaliation claim should be recognized as one for marital status discrimination, even though the legislature did not provide for such a claim when it expressly modified Florida's common law to provide a limited claim for retaliatory discharge.

Plaintiff's argument contravenes settled Florida law. He asks this Court to prohibit discrimination on the basis of marital relationships, without any action directed at marital status, whereas the legislature has chosen to prohibit discrimination based on an individual's marital status. But plaintiff requests relief that only the legislature may give. In construing the Act, courts may not invade the province of the legislature and add words -- marital relationship in addition to marital status -- that would change a statute's plain meaning. Metropolitan Dade County v. Bridges, 402 So. 2d 411, 414 (Fla. 1981), receded from on other grounds, Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986). Indeed, as discussed more fully in Part I of this brief, a court may not depart from the plain and common meaning of terms used in a statute unless the court is "necessarily led to a determination that the legislature intended a different meaning to be adopted to it." Gay v. City of Coral Gables, 47 So. 2d 529, 532 (Fla. 1950). The plain and common meaning of "marital status" is legal position with respect to marriage, not marital relationship.

Furthermore, the Florida legislature left no indicia whatsoever of any intent to cause the extraordinary and fundamental changes in the employment law of Florida that would accompany adoption of plaintiff's proposed view of marital status discrimination -- a view that goes far beyond both the narrow and broad views of martial status discrimination. It is inconceivable that the legislature could have intended to make so great a change without uttering so much as a word in this regard. If the legislature wished to outlaw discrimination based solely on marital relationships, rather than solely or in part marital status, it certainly would have said so. To interpret the Act today as prohibiting marital relationship discrimination, where there is no evidence that the 1977 legislature ever envisioned or intended such drastic changes to the common law, would amount to improper judicial legislation. Radio Tel. Communications, Inc. v. Southeastern Tel. Co., 170 So. 2d 577, 581 (Fla. 1964) (to interpret a statute to encompass a situation that was obviously not within the purview of the legislature or the people at the time it was enacted is to engage in judicial legislation).

Plaintiff's argument is simply an attempt to escape the plain consequences of Florida's long established and soundly reasoned employment at will doctrine, and it should be firmly rejected as such. At shown at the outset of this brief, this Court's clear precedent establishes that an employer may discharge an employee in retaliation for the employee's acts. DeMarco v. Publix Super Markets Inc., 384 So. 2d 1253 (Fla. 1980); see also Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994); Scott v. Otis Elevator Co., 572 So. 2d 902, 903 (Fla. 1990); Smith v. Piezo Tech. & Prof'l Adm'rs., 427 So. 2d 182, 184 (Fla. 1984). DeMarco is illustrative of the doctrine's application

under the facts of this case. There, a child was injured in a supermarket where her father worked. When the father sued the supermarket on his daughter's behalf, the employer told him that if he did not withdraw the suit, he would be fired. The father did not withdraw the suit and the employer followed through with its threat. The father then sued the employer directly, claiming, among other things, that he was wrongfully terminated. Both the Third District and this Court affirmed the claim's dismissal, holding that the father's employment was at the will of both parties and that the employer could not be sued for the retaliatory discharge. 384 So. 2d at 1254.

This Court's decision in Arrow Air further clarified that the employment at will doctrine gives employers the right to fire an employee who sues the employer, regardless of the "policy" implications of the employer's action. The employee in Arrow Air was fired for reporting safety violations in connection with an airline flight just before the legislature enacted the private sector Whistle-Blower's Act. Citing the "policy" ground that retroactive application would further the law's noble purpose, the Third District held that the new law was remedial and thus retroactive. Walsh v. Arrow Air, Inc., 629 So. 2d 144 (Fla. 3d DCA 1993). Declaring that airlines were previously obligated by statute to utilize due care, the Third District specifically held that the employer's decision to terminate an employee for a reason clearly contrary to public policy was "not a substantive right based on any concept of justice, ethical correctness, or principles of morals." Id. at 150.

This Court reversed that decision. Arrow Air held that Florida common law does not prohibit retaliatory firings and that the employer's right to fire the employee for reporting safety violations could not be retroactively revoked

absent direction from the legislature, regardless of the fact that finding the law retroactive would more fully vindicate its purpose. 645 So. 2d at 424-25.

DeMarco and Arrow Air confirm that the employment at will doctrine permits an employer to fire an employee if the employee himself participates in a law suit against the employer. Certainly that doctrine offers no less protection in cases such as the instant one, where the alleged retaliation occurred because someone other than the employee filed a law suit against the employer.

Furthermore, and directly contrary to plaintiff's argument, these decisions demonstrate that the employment at will doctrine reflects Florida's long-standing public policy determination in favor of granting both employees and employers the right to terminate their employment relationships at any time and for any reason. Under this doctrine, plaintiff was free to leave his job without any reason or explanation; he was free, for example, to go to work immediately for a competitor of his employer. Thus, there are trade-offs which benefit all parties, and this long-standing balance of the interests of employers and employees should not be disturbed by this Court.

As the Third District has emphasized, to diminish this law through a judicially made exception for retaliation "would abrogate the inherent right of contract between employer and employee," "overrule longstanding Florida law and create uncertainty in present employer-employee relationships as to the rights of the parties," and be "contrary to one of the basic functions of law": fostering certainty in business relationships. Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327, 1329 (Fla. 3d DCA 1985). Rejecting a policy argument like plaintiff's, Hartley held that the determination of what constitutes public policy,

or how competing policies should be weighed, should be made by the legislature, not the courts. Id.

Hartley is entirely consistent with this Court's precedent, which holds that once the legislature has begun to abrogate the doctrines of the common law, as it did in the Act by providing a limited claim for retaliatory discharge and prohibiting discrimination based on marital status, the courts should not intrude on that process but rather should permit any further extensions to be made by the legislature. State v. Egan, 287 So. 2d 1, 8 (Fla. 1973) (where the legislature has made changes to the common law, further changes should come from the legislature, not the courts, if such changes are desired). In short, where the legislature makes a partial modification to the common law, it may be presumed that those portions that remain unchanged meet with the legislature's approval. Ripley v. Ewell, 61 So. 2d 420, 422 (Fla. 1952).

That is exactly the case here. The legislature has expressly addressed the subject of retaliatory acts by employers, and it has only prohibited retaliatory action against those persons who themselves make claims of unlawful discrimination under the Act. § 760.10(7), Fla. Stat. The Act does not empower anyone other than the person filing the original discrimination claim to file a claim of retaliation. Because plaintiff did not file an earlier discrimination claim, he clearly falls outside the ambit of the retaliation statute.

It goes without saying that the ramifications of a judicial change in long-standing Florida law in accordance with the far-reaching view urged by plaintiff would be prodigious. To accept plaintiff's view of marital status discrimination would be to prohibit Florida employers from taking action with respect to an employee whenever the employee's marriage (or the employee's

divorce, separation or perhaps even non-marriage) constitutes a link to the person whose conduct motivates the employer. This would allow marital status discrimination claims to be founded on an infinite number of employment decisions and would create tremendous uncertainty in employment law. The class of persons protected by the discrimination laws would effectively explode to include not only employees but their spouses. There is no reason to believe that the legislature intended this to be the law of Florida.

Indeed, were this the rule in Florida, the employment at will doctrine would be turned on its head to the extent employees could ever link discharges to actions or characteristics of their spouses. The undesirable traits of employees' spouses would become the burden of Florida's employers, and hiring an employee would amount to hiring his or her spouse. There is no indication that the legislature ever intended such a result.

Ultimately, plaintiff's argument rests on the notion that he finds it unfair to be fired because of his wife's actions. However, as the Commission pointed out in Smith when it rejected this exact position, the law does not prohibit unfair business decisions, only ones based on unlawful discrimination. Smith v. Food Lion, Inc., 17 F.A.L.R. 3040, 3042 (F.C.H.R. 1994). Accordingly, plaintiff's "policy" argument to expand the Act's marital status discrimination proscription to include discrimination not directed at an individual's marital status should be rejected.

CONCLUSION

The question certified to this Court by the Eleventh Circuit Court of Appeals, as well the question as restated by plaintiff, should be answered in the

negative. Under the plain language of the Act, regardless of whether the broad or narrow view is followed, there is unlawful marital status discrimination only where an employment decision is directed at least in part at the institution of marriage by focusing specifically on a person's status as married, divorced, separated, widowed or unmarried.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer Brief was served by U.S. Mail on Thomas J. Pilacek, 601 South Lake Destiny Road, Suite 110, Maitland, Florida 32751, this 21st day of September, 1998.

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