IN THE SUPREME COURT
STATE OF FLORIDA

SUPREME COURT CASE NO.: 93, 534
11TH CIR. CASE NO.: 97-2428
DC NO: 96-00865-CIV-ORL-19

ROSARIO DONATO,

Plaintiff/Appellant,

vs.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,

Defendant/Appellee.
_____/

APPELLANT'S AMENDED REPLY BRIEF

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

THOMAS J. PILACEK & ASSOCIATES
Maitland Green, Suite 110
601 South Lake Destiny Road
Maitland, FL 32751
(407) 660-9595

Thomas J. Pilacek, Esq.
FL Bar No. 143576
Counsel for Plaintiff/Appellant

ARGUMENT AND CITATIONS OF AUTHORITY

PREFACE

DONATO contends that AT&T's entire analysis boils down to the stubborn adherence to its *ipse dixit*: i.e., its assertion that the term "marital status" used in the Florida Civil Rights Act is plain and unambiguous, and is not susceptible to a meaning which includes the broad interpretation placed upon it by the Florida Commission on Human Relations in FAC Rule 60Y-3.001(17), that is, "the identity of the spouse and the relationship to the aggrieved person." If the Statute is found to be ambiguous, then AT&T's entire remaining argument folds like a house of cards because it ignores the rules of statutory construction, and creates a semantic distinction without a difference.[1]

I. A PROPER STATUTORY INTERPRETATION OF THE TERM "MARITAL STATUS" REQUIRES A BROAD CONSTRUCTION WHICH INCLUDES DONATO'S COMPLAINT. (ABR. 13-25).

A. The Term "Marital Status" Subsumes The State of Marriage Between One Spouse And Another. (ABR. 13-17).

[1] References are: to DONATO's Initial Brief "BR."; and to AT&T's Answer Brief "ABR."

In his Initial Brief, DONATO has argued that the term "marital status" is ambiguous and requires interpretation, and that an appropriate statutory analysis of the ambiguous provision requires the broad interpretation urged by DONATO.[2] (BR. pp. 11-17). AT&T's response is that the "plain meaning" of "marital status" requires a narrow construction. (BR. 6-14). By its silence, AT&T appears to concede that if the "plain meaning" of the term "marital status" is found to be ambiguous, then an appropriate statutory analysis (BR. 11-17) of the term requires the broad interpretation urged by DONATO, under ordinary principles of statutory construction approved by the Florida Courts.[3]

AT&T attempts to support its reasoning by reference to other Statutes and Florida cases construing those other Statutes. (ABR. 8-10). None of these Statutes or decisions address the question presented here, i.e. whether the term as used in the Florida Civil Rights Act is broad enough to include discrimination based on the identity of a particular spouse.

---

[2] and adopted by the Florida Commission on Human Relations.

[3] AT&T relies upon an article written by management advocate John-Edward Alley in 1980 (ABR. 10-11), which is contrary to the later-adopted view of the Florida Commission on Human Relations. The asserted connection to *Stroud* is nothing more than speculation. *Stroud* was decided in 1971. The marital status prohibition was enacted in 1977, without legislative comment. There is absolutely no indication of any legislative connection between the two.

AT&T then makes reference to decisions from other states (BR. 12-13) which have committed themselves to a narrow construction of the term "marital status." In none of those decisions, however, were the circumstances and legal history in Florida present: the legislature had not statutorily required a liberal construction; the administrative agency had not enacted a rule of broad construction; and the legislature had not failed to amend the Statute to require a narrow construction.

Perhaps the most cogent response to AT&T's "plain meaning" argument was stated by the Hawaii Supreme Court in *Ross v. Stouffer Hotel Co.*, 879 P.2d 1037 (Hawaii, 1994). There, Hawaii's Human Rights Statute contained a definition of the term "marital status" as being "the state of being married or being single." 879 P.2d at 1041. Nevertheless, the Court found the Statute to be ambiguous, and included discrimination based on the identity and occupation of the individual spouse. In rejecting the "plain meaning" argument raised by AT&T here, the Court stated that that interpretation:

> "Unambiguously permits employers to discriminate against married persons so long as the discrimination is based on the 'identity and occupation of a person's spouse,' and not solely on the fact that he or she is married, regardless of to whom."
>
> That extremely restrictive reading of the Statute ignores the simple fact of life that when a person marries, it is always to a particular person with a particular 'identity.' Thus, the

> 'identity' of one's spouse (and all of his or her attributes, including his or her occupation) is implicitly subsumed within the definition of 'being married.' The two cannot be separated. It makes no sense, therefore, to conclude, as the dissent does, that an employer who discriminates based on the 'identity and occupation' of a person's spouse is not also discriminating against that person because he or she is married. An employer can't do one without the other." 879 P.2d at 1041.[4]

If the term "marital status" is (properly) found to be ambiguous, and broad enough to subsume the possibility of an examination into the identity of the spouse (as *Owens* and the Florida legislature clearly recognized), then the FCHR's broad construction of the Statute set forth in its administrative rule must be given deference. *United States Gypsum Co. v. Green*, 110 So.2d 409 (Fla. 1959); *State Ex Rel Franklin County v. Lee*, 188 So. 755 (1939); *McKinney v. State*, 83 So.2d 875 (Fla. 1955). There the inquiry ends.

B. <u>The Florida Commission Has Construed The Statute Broadly To Encompass DONATO's Claim, And The *National Industries* Court Did Not Adopt A "*Per Se*" Rule Of Narrow Construction. (ABR. 14-29).</u>

1. <u>The Commission's Decisions.</u>

---

4 One court which adopted the broad view of "marital status" found the term ambiguous precisely because of the split of legal authority among the states and the closely divided decisions of many of the courts. *River Bend School District v. Human Rights Comm.*, 597 NE 2d 842 (Ill. App., 3 Dist., 1992).

AT&T next argues that the Florida Commission on Human Relations' broad construction of the term "marital status" is nevertheless not broad enough to encompass DONATO's claim, since the Commission relied on the reasoning of the Minnesota Supreme Court in *Kraft, Inc. v. State*, 284 N.W.2d 386, 388 (Minn. 1979) which was later clarified, and limited, by a subsequent Minnesota Supreme Court decision (*Cybyske v. Independent School District No. 196*, 374 N.W.2d 256 (Minn. 1984). AT&T is wrong. Moreover, regardless of the ultimate outcomes of the particular cases which are not factually similar to DONATO's, the Commission has continued to adhere to the reasoning and the interpretation announced in *Owens* in each of its post-*Cybyske*, post-*National Industries*, decisions.[5] If the FCHR's administrative rule enacted in 1993, and its decisions are given the appropriate deference, AT&T's argument fails.

What AT&T's *Cybyske* argument overlooks is that the Minnesota Court therein continued to adhere to a broad construction of the Statute including the identity of the spouse:

> "We adhere to our broad construction of marital status as enunciated in *Kraft*; i.e., in determining whether marital status discrimination exists, the identity of the spouse is an

---

5 *Brown v. Viking Fire Protection, Inc.*, 15 FALR 1625, 1527 (5/20/92); *Smith v. Food Lion, Inc.*, 17 FALR 3040, 3042, 3047 ¶24 (3/22/94); *Potasek v. The Florida State University*, 18 FALR 1952, 1953 (4/17/95).

> important factor. We apply this approach, however, in the context of constructing a legislative intent. The legislature did not intend to proscribe a particular political posture, whether of an employee or an employee's spouse in the Human Rights Act." *Cybyske*, 347 N.W.2d at 261.

AT&T would have the Court believe that the *Cybyske* Court adopted a construction of the Statute limiting its application to policies directed at the institution of marriage in general, without regard to the identity of the spouses' individual circumstances. As seen above, not only is that assertion incorrect, but in addition, the *Cybyske* Court based its reasoning process on a determination of whether the discrimination occurred because the spouse either enjoyed protected status under the Minnesota Human Rights Act, or engaged in activities protected by that Act, concluding that those circumstances were not present. They are, however, present here: DONATO was terminated precisely because his wife, a former AT&T employee, had sued AT&T for unlawful sex discrimination (which the Florida Commission had found cause to exist), for which she enjoyed additional protection from retaliation under the Act. (See BR. 30-31).

AT&T's misguided attempt to support its argument by reference to the post-*Cybyseke* intermediate court decision in *State By Johnson v. Floyd Wild, Inc.*, 384 N.W. 2d 185 (Minn. Ct. App. 1986) instead illustrates the propriety of DONATO's construction, and illustrates the reason why DONATO has posed a restated question

for consideration by the Court: i.e., that the presence or absence of a legitimate business reason for the employment decision is properly taken into account in determining whether discriminatory intent is present in the first instance. (Section III, *infra*).

In *Floyd Wild*, the wife Jamie Wild had been given a job with the corporation initially because of her marriage into the family which owned it. She was terminated months before her marital status actually changed because of the detrimental effect of the divorce proceeding on the owner-family members. 384 N.W. 2d at 188. In a four-three decision with a strong dissent, the majority reasoned that these circumstances demonstrated that there was a reason for the decision separate and apart from Jamie Wild's marital status:

> "Respondent's actions were not aimed at marital status per se. Rather, they were the result of Ms. Wild's rejection of attempts to keep the family together." (*Id.*).

Implicit in this analysis is that a reason separate and apart from the marital relationship was properly considered in determining whether marital status discrimination exists under the broad view. This is perfectly consistent with what DONATO contends is the appropriate reading of *National Industries* (BR. 23-27) and those FCHR decisions which, while adhering to the broad view urged by DONATO, have nevertheless concluded on the basis of <u>all the facts</u> that discriminatory intent

was not present because the employer's motives were premised upon business reasons.

AT&T's argument that *Cybyseke* and *Floyd Wild* support only a "marital status plus" interpretation is therefore wrong.

2. *National Industries*.

AT&T attempts to evade the plain fact that the Court in *National Industries v. Commission on Human Relations*, 527 So.2d 894 (5th DCA Fla. 1988), the only reported Appellate decision addressing the scope of "marital status" discrimination, failed to reject the Commission's broad interpretation and instead focused on the circumstances before it in determining whether discriminatory intent was present as a factual matter (BR. 25-29) by urging that *National Industries* adopted a rule *per se* requiring discrimination aimed at the status of marriage in general as opposed to an examination of the particular circumstances and relationship of the married couple. (ABR. 20-25). This argument is fatally flawed in at least two respects.

First, the *National Industries* Court said no such thing, and AT&T fails to point to any language to support that proposition.

Second, AT&T again argues that the *National Industries* Court merely approved of a "broad interpretation" aimed at the "legal status" of marriage (i.e., "marital status plus"). The obvious problem with this argument is that it goes beyond

mere "status" and requires an examination into the particular circumstances of the marital relationship, at least in the case of anti-nepotism policies. The question to be answered becomes "who are you married to?"

By its argument, AT&T tacitly concedes that if it were to publish a rule prohibiting employment of individuals married to spouses protected by the Florida Civil Rights Act who have sued AT&T for violating their rights, that would constitute an attack on "the institution of marriage in general", and would be therefore unlawful. That argument is patent nonsense: there is no difference between such a rule and conduct taken in the absence of a rule if the motivation is identical.

II. THE ANTI-NEPOTISM AMENDMENT TO §760.10 INDICATES AN INTENT BY THE LEGISLATURE TO PERMIT SCRUTINY INTO THE IDENTITY OF THE SPOUSE. (ABR. 25-28).

AT&T argues, based on its erroneous view of *National Industries* discussed above, that the "broad" view encompasses only "subclasses" such as firing single pregnant females (ABR. 31).[6] This is disingenuous for two reasons.

First, this argument admits that the legislature's failure to amend, and *National Industries*, requires an interpretation at least broad enough to prohibit discrimination

---

6 In reality, this is a species of sex discrimination prohibited by 42 U.S.C. §2000e(k).

based on marriage to spouses employed by competitors. (ABR. 31). There is no difference between such a "subclass" and a "subclass" composed of spouses who sue AT&T for unlawful discrimination. In either event, the identity of the spouse and relationship to the employee, and not merely the "institution of marriage," is in issue; and the action is taken, at least in part, because of the marital relationship.

Second, the "subclass" argument regarding spouses of competitors is inconsistent with the rationale of *National Industries*. While AT&T admits such a "subclass" would constitute marital status discrimination, *National Industries* would not find discrimination if the reason for a termination were a legitimate business reasons (such as furnishing trade secrets to the spouse) regardless of the rule.

These two flaws demonstrate that the *National Industries* Court acknowledged, but did not overrule, the Commission's broad definition of "marital status" in other factual contexts based on the identity of the spouse and the relationship to the employee.

Moreover, AT&T's argument that the 1992 Amendment was <u>not</u> a reaction to a part, but not all, of the broad view adopted by the FCHR and the Second District Court of Appeals in *Owens* (ABR. p. 29-30) ignores the plain language of the Florida Administrative Code: it posits that a narrow "broad" view limited only to "status plus" does not include the identity of the spouse and the relationship to the employee

(ABR. 32). This argument cannot be reconciled with the language of the Florida Administrative Code itself.

At bottom, while DONATO's argument is in complete harmony with the rules of statutory construction, legislative history, the Florida Administrative Code, and the decisions of both the FCHR and the Fifth District Court of Appeals, AT&T's approach amounts to nothing more than variations upon its unsupported and unsupportable premise that "marital status" is restricted to what AT&T contends is its "plain meaning."

III. PUBLIC POLICY REQUIRES REVERSAL. (ABR. 32-38).

Assuming that the term "marital status" is ambiguous, the question then becomes one of determining the appropriate scope of the prohibition. With regard to the first possible interpretation, i.e. AT&T's argument that the term is limited to "marital status plus" some additional factor, DONATO has pointed out above that once the identity of the spouse and relationship to the aggrieved employee are considered, that restriction is merely a semantic difference with DONATO's asserted construction and is in reality a denial of a construction which includes identity of the spouse and relationship to the employee while paying lip service to it.

A second approach, that adopted by the *Cybeske* Court, is also possible. That approach is broad enough to include only discrimination based upon the spouse's

protected status, or protected activities, under the Florida Civil Rights Act. If that approach is adopted, then DONATO has stated a claim, since Lynda Donato had filed a lawsuit alleging sex discrimination pursuant to the Florida Civil Rights Act against AT&T, an activity which is expressly protected by §760.10(7), Fla. Stats.

That is where DONATO's public policy argument, set forth at BR. 28-29 and completely ignored by AT&T, comes into play. While AT&T's construction of the Act would permit an employer to terminate an employee just because his spouse is a minority, or is handicapped, or of a particular religion, or color, or national origin, or age – for none of which reasons it could lawfully fire the employee himself, that construction is directly contrary to the stated purpose of the Act to secure for all individuals within the State freedom from discrimination for those reasons (§760.01(2)), and is directly contrary to the legislature's stated intent that the Act's provisions be liberally construed to further those purposes (§760.01(3)). The Act's protections would be hollow indeed if its prohibition against marital status discrimination did not, at least, extend protection to an employee because of unlawful discrimination toward the spouse.

The third possible interpretation of the term "marital status" extends to any action which is based on the identity of the spouse and relationship to the aggrieved

employee. It is here that AT&T's "public policy" argument of at-will employment has arguable application.

AT&T's argument is simply that this Court has taken the approach that any exception to the general rule of at-will employment is limited to those enacted by the legislature, and that the courts will not fashion "public policy" exceptions which have not been legislatively created. The argument continues that if an employer, in the absence of a legislated exception, may fire an employee for any reason whatsoever, this third interpretation of "marital status" discrimination would in effect judicially create an exception which the legislature did not authorize.

Unfortunately for AT&T, that argument begs the very question presented, i.e. whether the legislature did, in fact, authorize a broad construction of the term, as construed by the administrative agency which the legislature established to administer and construe it. The answer to the question of why an employer should not be permitted to fire an employee because the spouse has done something (or for any other reason) which would enable the employer to lawfully fire the employee for those same reasons is easily answered: because the legislature has declared that actions taken against the employee only because of the identity of the spouse and relationship with the employee are not permissible in the decision-making process.

Although this Court does not necessarily have to reach that question here, nevertheless DONATO contends that the appropriate scope is determined by examining the interest of the employer to be served by terminating an employee because of his or her spouse, i.e. whether a legitimate business reason exists, as DONATO advocates in his restated question. This is consistent with *National Industries*. Hence, the appropriate inquiry to be made is "what does the spouse have to do with the employment relationship?"

Donato suggests that if the answer to the question disclosed some rational, legitimate, albeit harsh connection between the spouse and the employer's business,[7] no marital status discrimination would exist. If, on the other hand, the answer disclosed no rational or legitimate connection to the employer's business (such as, for example, a CEO believed that a spouse was too ugly) then all that would remain is the fact that the action was taken based on the prohibited factors of the identity of the spouse and relationship to the employee.

CONCLUSION

[7] (as in *National Industries*, where the employee was fired to keep the spouse off the property; or in *Smith v. Food Lion*, 17 FALR 3040 (1994), where the husband was fired for failing to address, as manager, his wife's writing bad checks to the company; or in *Brown v. Viking Fire Protection, Inc.*, 15 FALR 1625 (1992), where a wife was fired because of the husband's employment with a competitor)

For the reasons expressed, DONATO respectfully contends that AT&T's "plain meaning" argument must be rejected; that legislative and administrative expressions require the construction urged by DONATO; that the FCHR and the *National Industries* Court did not adopt the view advocated by AT&T; and that public policy requires a broad interpretation under the circumstances of this case. DONATO respectfully requests that the question certified to this Court be answered in the affirmative.

Respectfully submitted,

THOMAS J. PILACEK & ASSOCIATES
Maitland Green, Suite 110
601 South Lake Destiny Road
Maitland, FL 32751
(407) 660-9595

BY: _____
Thomas J. Pilacek
FL Bar No. 143576

Counsel for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Sylvia H. Walbolt, Esq., CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A., Barnett Tower, Suite 2300, One Progress Plaza, 200

Central Avenue, Post Office Box 2861, St. Petersburg, FL 33731, this 9th day of November, 1998.

THOMAS J. PILACEK & ASSOCIATES
Maitland Green, Suite 110
601 South Lake Destiny Road
Maitland, FL 32751
(407) 660-9595

BY: _____
Thomas J. Pilacek
FL Bar No. 143576

Counsel for Plaintiff/Appellant